SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 180

HOLYOKE WATER POWER COMPANY,
PETITIONER,

vs.

AMERICAN WRITING PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 55719. In Bankruptcy

In the Matter of AMERICAN WRITING PAPER COMPANY, INC., Debtor

PETITION OF HOLYOKE WATER POWER COMPANY FOR LEAVE TO INTERVENE—Filed July 13, 1934; Allowed August 21, 1934

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

Now comes the Holyoke Water Power Company and respectfully alleges and shows:

1. That your petitioner is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and owns and operates a dam, canals and water power development in the City of Holyoke in said Commonwealth, [fol. 2] and that the mill sites of the debtor referred to in paragraph 3 of its petition, in the City of Holyoke, Massachusetts, are held by the debtor under grants either directly from your petitioner or through other persons or corporations under mesne conveyances originating with your petitioner, or its predecessor, the Hadley Falls Company, and that said debtor is obligated to your petitioner for the performance of the terms and conditions of said grants and indentures and for the rentals of the mill powers held by it in Holyoke.

2. That there is pending in the District Court of the United States for the District of Massachusetts a suit under the caption of Holyoke Water Power Company v. American Writing Paper Company, Incorporated, No. 5932 in said court, in which your petitioner claims the sum of $32,034.24 for rentals unpaid by said debtor, and there is also pending in the Superior Court of the Commonwealth of Massachusetts for the County of Hampden a suit under the caption of Holyoke Water Power Company v. American Writing Paper Company, Incorporated, Superior Court, Hampden County, No. 43466 Equity, involving the use of mill powers

held by said debtor under the terms of said grants and indentures and the unauthorized use of water drawn from the canals or water courses of the petitioner. That your petitioner has other claims for rentals against the debtor amounting to $37,121.01.

3. That the grants and indentures under which the debtor holds its mill sites in Holyoke involve rights between said debtor and your petitioner which are necessarily to be continuing and operative prospectively and indefinitely and that, therefore, your petitioner is much interested and concerned with the affairs of said debtor.

4. That your petitioner prays for leave to intervene in the above-entitled proceedings for the purpose of raising before the court the question of the constitutionality of Sections 77-A and 77-B, or any portion thereof, of the Act of Congress approved June 7, 1934, with reference to proceedings for the relief of debtors.

5. That for the reasons hereinbefore set forth, not waiving but insisting on the rights prayed for in paragraph 4 hereof, your petitioner prays for leave to intervene in the [fol. 3] above-entitled proceedings and for notice of and for a right to be heard in the following matters or any of them:

(a) On the question of the appointment of any trustee or trustees;

(b) On any plan of reorganization proposed;

(c) On any proceedings affecting the property or water rights held by the debtor under any indentures from the petitioner or its predecessor, the Hadley Falls Company, or their respective grantees;

(d) Upon any proceedings with reference to the rejection or disaffirmance of any such indentures;

(e) Upon any proceedings with reference to the sale, separation, or segregation of any of the assets of the debtor, by a holding company or by any other method directly or indirectly.

(f) Upon any proceedings involving present pending litigation by your petitioner against the debtor;

(g) Upon any proceedings with reference to the foreclosure of liens or mortgages upon the property of the debtor;

(h) Upon any other proceedings or action affecting or which may affect the relations between the petitioner and the debtor under the terms of the grants or indentures under which the debtor holds its mills in Holyoke, or under any other agreements between the petitioner and the debtor.

Holyoke Water Power, Petitioner, by Robert E. Barrett, President and Treasurer. Warren, Garfield, Whiteside & Lamson, 30 State Street, Boston, Massachusetts, Avery, Gaylord, Healy and Button, 56 Suffolk Street, Holyoke, Massachusetts, Counsel for the Petitioner.

Boston, Massachusetts, July 12, 1934.

Subscribed and sworn to by the above-named Robert E. Barrett, before me, Scott D. Ferguson, Notary Public. [Seal.]

[fol. 4] August 21, 1934.

McLellan, J.:

After hearing counsel, the foregoing petition is hereby allowed.

By the Court.

Arthur M. Brown, Deputy Clerk.

In United States District Court

Petition of Holyoke Water Power Company Relative to Payment of Rentals by the Debtor—Filed January 18, 1935

To the Honorable the Judges of the District Court of the United States:

Now comes the Holyoke Water Power Company and respectfully alleges and shows:

1. That your petitioner has heretofore been permitted to intervene in these proceedings and is more fully described

in its petition therefor to which petition reference is hereby made.

2. That the debtor, American Writing Paper Company, Incorporated, holds under indentures from your petitioner through other persons or corporations under mesne conveyances originating with your petitioner certain mill powers, said indentures being recorded in Hampden County, Massachusetts, Registry of Deeds, in Book 426, page 469; Book 388, page 167; Book 385, page 274; Book 385, page 445; Book 426, page 465; Book 503, page 524; Book 579, page 109; Book 387, page 216; Book 487, page 94; Book 447, page 369; Book 501, page 515; Book 533, page 293, and Book 603, page 55; and that under the terms of said indentures the quarterly and semi-annual rentals reserved by your petitioner for said mill powers are payable under a provision practically the same in all of said indentures, one of which is typical for the others and calls for payment of rentals in "a quantity of gold equal in amount to $1,500.00 of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency". Reference is hereby made for a more full description of said indentures to the record of a case in this court brought by your petitioner against said debtor and numbered Law 5932, and heard in this court on November 2, 1934 and January 2, 1935, and decided on said [fol. 5] January 2, 1935, and reference is also made to the books and respective pages thereof hereinbefore recited in which are recorded said indentures in the Registry of Deeds of said Hampden County.

3. The debtor has tendered to the petitioner for payment of the instalment of these rentals which became due on July 1, 1934, together with the instalment amounting to four hundred and fifty dollars ($450) which became due on the same date but under a rental clause of a different type, a check in the amount of twenty-two thousand two hundred seventy-nine dollars and thirty-one cents ($22,279.31); for payment of the instalment of these rentals which became due on October 1, 1934, a check in the amount of two hundred ninety-nine dollars and twenty-five cents ($299.25); for payment of the instalment of these rentals which became due on January 1, 1935, together with the instalment amounting to four hundred and fifty dollars ($450) which became due on the same date but under a rental clause of a different

type, a check in the amount of nineteen thousand nine hundred seventy-nine dollars and ninety-three cents ($19,979.93). The debtor accompanied each of these checks with a letter, copies of which are hereto annexed marked "Appendix A", setting out that the check therein referred to was "in full payment of the instalments" of mill power rentals due July 1, 1934, or October 1, 1934, or January 2, 1935, respectively; that your petitioner deposited and collected the checks of July 1, and October 1, 1934, at the same time replying to the letters of the debtor of those dates by letters, copies of which are hereto annexed and marked "Appendix B", in which your petitioner set out that the amounts of the checks did not constitute full payment of the instalments of rentals due and calling the debtor's attention to the respective indentures.

4. That your petitioner has not deposited or collected the check received by it from the debtor on January 2, 1935, for the instalment of rentals due January 1, 1935, for the reason that on said January 2, 1935, this Honorable Court, in Law case No. 5932, above referred to, determined by an opinion by McLellan, J., in which it was stated:

"In the typical indenture the defendant undertook to pay the equivalent of the amount of gold in $1500.00 of gold coin. [fol. 6] The plaintiff's damages are to be measured in this way, and the question for determination is the value of gold in Holyoke, Massachusetts, where, and on January 2, 1934, when the rental was payable. * * *

"The burden of proof is upon the plaintiff to establish his damages and the only relevant evidence submitted as to the market price of gold was the price obtainable from the Government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by executive order. On this basis the plaintiff was entitled to receive in currency at Holyoke, Massachusetts, on January 2, 1934, the sum of $20,887.86."

In view of that opinion and of the fact that the price which the Government mints would pay for gold was fixed by Provisional Regulations issued under the Gold Reserve Act of 1934, by the Secretary of the Treasury, approved by the President, on January 31, 1934, as thirty-five dollars ($35), your petitioner wrote a letter on January 12, 1935, to the

debtor, a copy of which is hereto annexed and marked "Appendix C" in which your petitioner demanded of the debtor an amount, viz, thirteen thousand five hundred thirty-six and sixty-eight cents ($13,536.68), additional to the amount tendered by the debtor in the check received by your petitioner on January 2, 1935, which additional amount should represent the difference between the amount of the check so received and the currency equivalent of the quantity of gold deliverable by the terms of the indentures to your petitioner in ounces of gold.

5. On each of these dates on which the three instalments of rent hereinbefore mentioned were payable, viz., July, 1, 1934, October 1, 1934, and January 1, 1935, the market price of fine gold was $35 per troy ounce of such gold purchased by the Government and the respective instalments therefore should have been in the amount of thirty-seven thousand four hundred and nine dollars and twenty-three cents ($37,409.23) for the instalment due on July 1, 1934, in the amount of five hundred and seven dollars and thirteen cents ($507.13) for the instalment due on October 1, 1934, and in [fol. 7] the amount of thirty-three thousand five hundred and sixteen dollars and sixty-one cents ($33,516.61) for the instalment due on January 1, 1935.

6. That under said indentures your petitioner would be entitled, except for the pendency of the proceedings under Section 77-B, to bring suit for the rentals or the balance of any rental not fully paid, against the debtor and following the entry of judgment in said suit to make entry upon the premises covered by the indenture and to hold and use the same subject to redemption by payment, within three years of such entry upon the premises, of the amount of judgment with interest and expenses, and that therefore delay in the payment of the true amounts due from the debtor to the petitioner greatly damages the petitioner and should not be permitted to arise and continue because of the pendency of the present proceedings.

Wherefore your petitioner prays:

1. That your petitioner be given permission to collect as a payment *pro tanto* the check received by it on January 2, 1935, without prejudice to or waiver of its right to establish and prove in the pending proceedings in this court its claim

for, and to collect by suit in this court or otherwise, the balance of the amount of rentals which became due on said January 1, 1935, over and above the amount of said check and notwithstanding the attempted imposition in the debtor's letter of January 2, 1935, of the condition that said check constituted full payment of the instalments of rentals due said January 1, 1935.

2. That the debtor be ordered to pay to the petitioner the full amount or in case of partial payments the balance of the full amount of the rentals according to the terms of the several indentures computed at the market price, viz., $35 per troy ounce of fine gold of the quantities of gold called for under the several indentures on the respective dates when such instalments were due, viz., July 1, 1934, October 1, 1934, and January 1, 1935.

3. Or in the alternative to the preceding prayer that your petitioner be given leave by an order of your Honorable Court to begin and prosecute suit in the District Court of the United States for the District of Massachusetts against [fol. 8] the debtor to recover the full amount or in case of partial payments the balance of the full amount of the rentals due according to the terms of the several indentures computed at the market price, viz., $35 per troy ounce of fine gold of the quantities of gold called for under the several indentures on the respective dates when such instalments were due, viz., July 1, 1934, October 1, 1934, and January 1, 1935, and that the injunction contained in the order of this Honorable Court dated June 25, 1934, be modified accordingly.

4. And for such other and further relief as to the court seems just.

Holyoke Water Power Company, by Warren, Garfield, Whiteside & Lamson, Avery, Gaylord, Healy and Button, Its Attorneys.

Of Counsel: Bentley W. Warren. Nathan P. Avery. James M. Healy.

Appendix "A" to Petition

American Writing Paper Company, Inc.

July 2, 1934.

Holyoke Water Power Company, Holyoke, Mass.

Gentlemen:

We enclose our check in the amount of $22,279.31, in full payment of the installments of non-permanent mill power rentals due July 1, 1934 and installments of permanent mill power rentals due July 1, 1934 to the Holyoke Water Power Company from the American Writing Paper Company, Incorporated, in accordance with the terms of the indentures recorded in Hampden County Registry of Deeds, as follows:

[fol. 9]

	Book	Page	Gross	Deductions Days	Hrs.	Amt.	Net
Crocker	533	293	$4,350.00	6	9	$184.87	$4,165.13
Dickinson	387	216	900.00)	7	9	211.64	3,838.36
	603	55	3,150.00)	7	22		
Gill	447	369	1,500.00	2	8	23.34	1,476.66
Linden	501	515	3,000.00	7	22	158.34	2,841.66
Norman	487	94	2,250.00	0	0	0	2,250.00
Parsons	426	469	450.00	0	0	0	450.00
Riverside	503	524	750.00)	10	0	117.50	1,532.50
	579	109	900.00)	11	6		
			$17,250.00			$695.69	
Net amount due 7/1/34							$16,554.31

* Days and hours deprived of water and corresponding amounts deductible according to indentures.

	Book	Page	Amount
Beebe & Holbrook	426	396	$700.00
Massasoit	385	274	900.00
Wauregan	385	445	1,125.00
Parsons	182	191	150.00
do	426	465	300.00
Riverside	503	524	750.00
do	579	109	300.00
Holyoke	188	535	300.00
Dickinson	387	216	450.00
Norman	487	94	750.00
Net due 7/1/34			$5,725.00

Yours very truly, American Writing Paper Company, Incorporated, by W. J. Norton, Treasurer.

[fol. 10] American Writing Paper Company, Inc.

October 5, 1934.

Holyoke Water Power Company, Holyoke, Mass.

GENTLEMEN:

We enclose our check in the amount of $299.25 in full payment of the following charge:

Three months rent of Non-permanent Mill Powers, Parsons Division, July 1, 1934 to October 1, 1934	$450.00
Less: 25⅛ days deprivation of water at $6.00	150.75
Net amount due	$299.25

Yours very truly, American Writing Paper Company, Incorporated, by W. J. Norton, Treasurer.

American Writing Paper Company, Inc.

January 2, 1935.

Holyoke Water Power Company, Holyoke, Mass.

GENTLEMEN:

We enclose our check in the amount of $19,979.93 in full payment of the installments of non-permanent mill power rentals due January 1, 1935 and installments of permanent mill power rentals due January 1, 1935 to the Holyoke Water Power Company from the American Writing Paper Company, Incorporated, in accordance with the terms of the indentures recorded in Hampden County Registry of Deeds, as follows:

[fol. 11]

	Book	Page	Gross	Deductions Days	Hrs.	Amount	Net
Crocker	533	293	$4,350.00	26	0	754.00	$3,596.00
Dickinson	387	216	900.00)	24	12	887.01	3,162.99
	603	55	3,150.00)	35	4		
Gill	447	369	1,500.00	23	2	230.90	1,269.10
Linden	501	515	3,000.00	35	4	703.40	2,296.60
Norman	487	94	2,250.00	1 Night	0	5.00	2,245.00
Parsons	426	469	450.00	0	0	.....	450.00
Riverside	503	524	750.00)	38 Night	0	414.76	1,235.24
	579	109	900.00)	37	6		
			$17,250.00			$2,995.07	
Net amount due 1/1/35							$14,254.93

* Days and hours deprived of water and corresponding amounts deductible according to indentures.

	Book	Page	Amount
Beebe & Holbrook Division	426	396	$700.00
Massasoit Division	385	274	900.00
Wauregan Division	385	445	1,125.00
Parsons Division	182	191	150.00
do Division	426	465	300.00
Riverside Division	503	524	750.00
do Division	579	109	300.00
Holyoke Division	188	535	300.00
Dickinson Division	387	216	450.00
Norman Division	487	94	750.00
Net due 1/1/35			$5,725.00

Yours very truly, American Writing Paper Company, Incorporated, by W. J. Norton, Treasurer.

APPENDIX "B" TO PETITION

July 3, 1934.

American Writing Paper Company, Inc., Holyoke, Massachusetts.

GENTLEMEN:

This is to acknowledge receipt on this day of a check of the American Writing Paper Company, Inc., in the amount of $22,279.31.

[fol. 12] In your letter which accompanied this check you stated that the check was "in full payment of the installments of non-permanent water power rentals due July 1, 1934, and installments of permanent mill-power rentals due July 1, 1934 to the Holyoke Water Power Company from the American Writing Paper Company, Inc., in accordance with the terms of the indentures recorded in Hampden County Registry of Deeds."

This check in the amount of $22,279.31 is not in full payment as you have stated and your attention is respectfully directed to the bills sent you by the Holyoke Water Power Company covering the above mentioned rentals.

Yours very truly, Holyoke Water Power Company, by Robert E. Barrett, President.

October 15, 1934.

American Writing Paper Co., Inc., Holyoke, Massachusetts.

GENTLEMEN:

This is to acknowledge receipt on October 5th, 1934, of a check of the American Writing Paper Company, Incorporated, in the amount of $299.25.

In your letter which accompanied this check you stated that the check was in full payment of the installment for three months rental of non-permanent mill powers due on October 1, 1934.

This check in the amount of $299.25 is not in full payment of this installment, in accordance with the terms of the indenture recorded in Hampden County Registry of Deeds, and your attention is respectfully directed to the bill sent you by the Holyoke Water Power Company, covering the above mentioned rental.

Yours very truly, Robert E. Barrett, President.

APPENDIX "C" TO PETITION

January 12, 1935.

American Writing Paper Co., Incorporated, Holyoke, Mass.

GENTLEMEN:

On January 2, 1935, we received a letter from you dated [fol. 13] January 2, 1935, enclosing a check drawn on the Central Hanover Bank and Trust Co., New York, N. Y., in the amount of $19,979.93 payable to our order. In your letter you stated that this check was in full payment of the installments of permanent and non-permanent mill power rentals due on January 1, 1935 under the indentures specified in said letter.

We beg to advise you that the amount of that check, under the terms of the several indentures, does not cover the amount due this company for the installments of rental specified in your letter. That check should have included an amount computed under the provisions of the indentures whereby you should pay us the equivalent in United States currency of 944.76052 troy ounces of fine gold computed at the value of such gold in Holyoke, Massachusetts, on January 2, 1935, when the rental was payable. This value is the price obtainable from the government on January 2, 1935,

when the price was that which had been expressly determined by the Secretary of the Treasury, approved by the President on January 31, 1934, as $35. per troy ounce of fine gold.

We hereby demand from you the additional payment in United States currency, to wit: $13,536.68.

Yours very truly, Robert F. Barrett, Treasurer.

IN UNITED STATES DISTRICT COURT

STIPULATION ON PETITION OF HOLYOKE WATER POWER COMPANY RELATIVE TO PAYMENT OF RENTALS BY THE DEBTOR—Filed March 5, 1935

The parties hereto, the Holyoke Water Power Company and the American Writing Paper Company, Incorporated, hereby stipulate and agree that the former may collect as a payment *pro tanto* the check received by it on January 2, 1935, for $19,979.93 as set out in its petition in this matter filed January 18, 1935, without prejudice to or waiver of its right to establish and prove in the pending proceedings in this court its claim for, and to collect by suit or otherwise, the balance, if any, of the amount of said rentals which became due on January 1, 1935, over and above the amount [fol. 14] of said check, with interest on any such balance but without interest on the amount of said check, and notwithstanding any condition contained in the debtor's letter of January 2, 1935, copy of which is annexed to said petition, that said check constituted full payment of the instalments of rentals due on said January 1, 1935; and without prejudice to or waiver of the right of the American Writing Paper Company, Incorporated, to establish and prove in the pending proceedings in this court or in defense of any such suit in this court or otherwise that the amount of said check represented the full amount due from it on January 1, 1935, as rentals under said indentures set out or referred to in said petition and in accordance with the terms and provisions thereof

March 5, 1935.

Warren, Garfield, Whiteside & Lamson, Avery, Gaylord, Healy & Button, by B. W. W., Attornevs for Holyoke Water Power Company. Choate, Hall & Stewart, Attorneys for American Writing Paper Company, Incorporated.

In United States District Court

Amended Answer of American Writing Paper Company, Incorporated, to Petition of Holyoke Water Power Company Relative to Payment of Rentals—Filed April 9, 1935

The American Writing Paper Company, Incorporated, the above-named debtor, answering the petition of the Holyoke Water Power Company filed herein on January 18, 1935, having heretofore filed an answer, as herein ordered, on or before February 1, 1935, respectfully moves that it may file the following amended answer in lieu thereof:

(1) The debtor admits the allegations of paragraph 1 of the said petition.

(2) The debtor admits the allegations of paragraph 2 of the said petition.

(3) The debtor admits the allegations of paragraph 3 of the said petition.

[fol. 15] (4) The debtor says that on March 5, 1935, the parties made a stipulation relative to the check received by the petitioner from the debtor on January 2, 1935, which has been filed herein, and that thereafter the petitioner deposited the said check.

The debtor admits the receipt of a letter from the petitioner on or about January 12, 1935, a copy of which is annexed to the petition as "Appendix C".

The debtor denies the materiality or relevance of the Provisional Regulations issued under the Gold Reserve Act of 1934 by the Secretary of the Treasury.

(5) The debtor denies each and every allegation contained in paragraph 5 of the petition.

(6) The debtor neither admits nor denies the statements contained in paragraph 6 of said petition and leaves the petitioner to establish the same so far as they may be material herein.

(7) And for further answer the debtor says that the sums which it has already tendered and paid to the petitioner and which the petitioner has already received in payment of the said rentals as set forth in paragraph 3 of the

petition constituted full and sufficient payment of the same, and that the petitioner is not entitled to anything further on the same.

Wherefore the debtor respectfully prays that all and several the prayers of the petition be forthwith denied and that this Honorable Court grant the debtor such other and further relief as may be just and proper in the premises.

American Writing Paper Company, Inc., by its Attorneys, Choate, Hall & Stewart.

April 8, 1935. The within answer may be filed.
Warren, Garfield, Whiteside & Lamson, Attorneys for the Plaintiff.

[fol. 16] In United States District Court

Statement of Evidence

Testimony Reduced to Narrative Form—Filed August 24, 1935; Approved September 27, 1935

Evidence for the Plaintiff

The testimony of Alexander B. Ferguson was substantially as follows:

He was cashier and accountant for the Holyoke Water Power Company and made out the bills and kept the accounts of the rentals due from the owners of the properties subject to rental payments to the Holyoke Water Power Company including the American Writing Paper Company. In connection with making out the bills he had occasion to compute the equivalents of gold called for in the indentures of the company, and, over the objection of counsel for the debtor, he was allowed to testify that he did so by the following method. He first arrived at the weight of pure gold in the dollar mentioned in the indenture, which he found to be .048375 troy ounces. He then multiplied the number of dollars mentioned in the indenture by the figure thus found, thus arriving at the number of ounces of gold due. The gold dollar consisted of 25.8 grains of .9 fine gold, the

equivalent of which in pure gold is 23.22 grains. There are 480 grains in a troy ounce. Thus, a quantity of gold equal in amount to $1,500 of the old weight would be 72.5625 troy ounces of pure gold, which would, at $35 per troy ounce, amount to $2,539.69. The amounts stated in the petition as having been paid are correct. The amounts which would be due on each rental date according to this method of computation are:

July 1, 1934—$37,409.23, in which was included by mistake a payment of $450 made by the debtor to the petitioner, and representing a rental payment under an indenture not in question in this suit.

October 1, 1934—$507.13.

January 1, 1935—$33,516.61, in which is likewise included a payment of $450 of the same nature as that above mentioned.

The differences between the amounts due on each of the three above mentioned dates, according to this method of computation and to the method employed by the debtor are, respectively:

[fol. 17]

July 1, 1934	$15,129.92
October 1, 1934	207.88
January 1, 1935	13,536.68

The total of these three figures, or $28,874.48, represents the difference between the gold equivalent computed upon the basis above described and the total amounts received from the debtor, no part of which difference has been paid.

The deductions from non-permanent mill power rentals representing rebates for periods during which power was not supplied were computed by the petitioner by the same method; the debtor, on the contrary, has computed the deductions upon the basis of $20.67 per ounce. The amounts of deprivation for which rebates are allowable are, however, agreed upon.

Upon cross examination by counsel for the debtor, Mr. Ferguson testified that the gross number of ounces of pure gold that the indentures called for on the several dates and

the corresponding amounts representing rebates for deprivation of power were as follows:

July 1, 1934		1089.64688 troy ounces.
	rebate	33.66888 troy ounces.
	net	1055.97800 troy ounces.
October 1, 1934		21.67675 troy ounces.
	rebate	7.27947 troy ounces.
	net	14.39728 troy ounces.
January 1, 1935		1089.64688 troy ounces.
	rebate	144.88649 troy ounces.
	net	944.76039 troy ounces.

The standard of weight and fineness taken as the basis for the witness' computation was that of the gold coin of the year 1894, or 25.8 ounces .9 fine.

At the request of counsel for the debtor, the witness then gave the results of an alternative method of computation by which he ascertained the number of ounces of gold .9 fine called for by the indentures instead of the number of ounces of pure gold as in the first method hereinbefore described. [fol. 18] The numbers of ounces of gold .9 fine called for by the indentures on the several dates were as follows:

July 1, 1934		1210.71875 troy ounces.
	rebate	37.41 troy ounces.
	net	1173.30875 troy ounces.
October 1, 1934		24.1875 troy ounces.
	rebate	8.0883 troy ounces.
	net	16.0992 troy ounces.
January 1, 1935		1210.71875 troy ounces.
	rebate	160.98501 troy ounces.
	net	1049.73374 troy ounces.

$31.50 per troy ounce is the price of .9 fine gold which is the equivalent of the price of $35 an ounce for pure gold.

Multiplying each of the three numbers of net ounces, arrived at as above, by $31.50 gives the same numbers of dollars which resulted from the first alternative method of calculation, namely $36,959.23, $507.13, and $33,066.61.

HUGH D. SPAULDING testified substantially to the following effect, his qualifications as an expert being admitted:

He was secretary of Handy & Harman, dealers in gold, silver and platinum, with whom he had been connected for over thirty-two years. The business of Handy & Harman is that of buying the metals and supplying them to fabricators and people of that kind throughout the country. The firm quotes daily what is known as the official quotation of silver, which is fixed by the witness and is accepted by the mines and smelting companies as a settlement basis for the silver content of ores. The firm has a federal license to deal in gold and the witness is quite familiar with the operations under federal licenses. The witness's firm does not import gold in its business.

The rest of the witness's testimony was over the objection of counsel for the debtor, as follows:

Some Americans do, however, import gold from London. An individual could, without a license, buy gold in the Lon- [fol. 19] don market and also purchase sterling exchange to pay for the gold, could have the gold shipped to this country, and upon arrival declare it with the customs authority and make a deposit in the assay office for payment. He could not, however, take it out of the custody of the customs authority. Upon making a deposit in the United States assay office he would obtain a receipt and upon either the same day or the following day the Government would pay him 90 per cent of its value. Upon weighing and assaying the gold, which would take about a week, he would receive the balance on the basis of $35 per ounce less ¼ of 1 per cent and a deduction for refining charges, which would depend upon the amount of bas- metals contained in the gold.

The witness's firm receives daily from the London market the official quotation of the price of pure gold in

London on that date. July 1, 1934, was a Sunday. The London quotation on June 30, 1934, was 137s. 10½d. The sterling rate, at the time the quotation was received, was 504⅛, so that the equivalent in United States dollars was 34.75; in other words, an ounce of gold would have cost in London $34.75 on that date.

On October 1, 1934, the London price was 141s. 6d; the sterling rate was 492.7/8, of which the equivalent in United States dollars was 34.87.

January 1, 1935, was a holiday in London. On January 2, the London Market quoted 140s. 10½d.; the sterling rate was 493 7/8, and the equivalent in United States dollars therefore 34.79.

On December 31, 1934, the quotation was 141s., the sterling rate was 494, and the United States dollar equivalent 34.83.

On days in the immediate vicinity of July 1 and October 1, 1934, and January 2, 1935, the quotations were substantially the same as upon those several dates.

The London gold market is a free gold market for all the world. If an American had bought gold in London on any of the foregoing dates at the price equivalent in American dollars to the London sterling quotation, there would have been added the expense of packing, carting, insurance, freight, and interest. At a rough estimate these combined [fol. 20] charges would come to about three or four cents an ounce of pure gold.

The debtor presented no evidence other than debtor's Exhibits A and B.

The following exhibits were introduced:

Petitioner's 1—Photostatic copy of typical indenture and proposals between American Writing Paper Company and Holyoke Water Power Company.

Petitioner's 2—Copy of Proclamation No. 2072, dated January 31, 1934, of the President of the United States, certified by the Secretary of State.

Petitioner's 3—Certified copy of the Provisional Regulations issued under the Gold Reserve Act of 1934 by the Secretary of the Treasury, and photostatic copies of the amendments thereto.

Debtor's A—Authenticated copy of certain orders of the Secretary of the Treasury.

Debtor's B—Group of forms referred to in the regulations, Exhibit 3, i. e. T. D. 12, 19, 20, 21, 22, 23 and 24.

Holyoke Water Power Company, by Warren, Garfield, Whiteside & Lamson, Avery, Healy & Button, Bentley W. Warren, Nathan P. Avery, James M. Healy, Donald C. Starr, its Attorneys.

Assented to. Charles P. Curtis, Jr.

September 27, 1935. Narrative form of testimony approved.

Elisha H. Brewster, United States District Judge.

[fol. 21] PETITIONER'S EXHIBIT 1

An Indenture made this first day of March A. D. 1895, by and between the Holyoke Water Power Company, a Corporation duly established and doing business at Holyoke, in the County of Hampden and Commonwealth of Massachusetts, of the one part and the Crocker Manufacturing Company, a Corporation duly established and doing business at said Holyoke, of the other part.

Whereas the said Crocker Manufacturing Company, has agreed to purchase of said Holyoke Water Power Company certain water rights as hereinafter and in the annexed proposals described, which proposals with all the terms, conditions, agreements and other matters therein contained, are hereby adopted by the parties and made a part of this Indenture, excepting always the eighteenth article therein contained, which it is agreed shall make no part of this Indenture; and also that the grantor shall not be obliged to reserve the full amount of rent specified in the Fifth Article of said Proposals, on sales or leases of mill-powers, situated on the lower level and canals; and whereas, said water-rights are to be conveyed in manner and form so as to give said Crocker Manufacturing Company the right to use said mill-powers as appurtenant to the mill-sites conveyed to the said Crocker Manufacturing Company by deeds dated March 31st, 1871, and October 16th 1890, and Recorded in Hampden County Registry of Deeds in Book 282—Page 167 and Book 468 Page 542 respectively.

Now, therefore, the said Holyoke Water Power Company, in consideration of Ten Dollars and other valuab' considerations paid to it by the said Crocker Manufacturing Company, the receipt whereof is hereby acknowledged, and of the rent hereinafter reserved, and of the other agreements of the said Crocker Manufacturing Company, does hereby grant, bargain, sell and convey unto the said Crocker Manufacturing Company the right to take and use in and upon the land aforesaid and as appurtenant thereto ten (10) non-permanent 24 hour mill-powers as hereinafter limited and described from the grantors Second Level Canal whenever in the opinion of the Hydraulic Engineer of the Grantor or such officer or agent of the grantor as may [fol. 22] have the matter in charge, there is sufficient water flowing in the Connecticut River per second, to permit such use in excess of the sum of the three quantities named, hereafter, viz:

1. The quantity of water per second needed to supply the lawful demands of all persons or corporations now having the right to use said water, from the second level canal, heretofore made or granted by said Holyoke Water Power Company, or those under whom it claims, including herein the two (2) mill-powers appurtenant to the mill called the New York Mill, conveyed to the Holyoke Water Power Company, by deed dated February 7th, A. D. 1882.

2. The quantity of water per second which may be needed to supply the lawful demands of all persons or corporations now having the right or agreements for rights to use said water, from the third or lower level canal, heretofore made or granted by said Holyoke Water Power Company or those under whom it claims, which may be in excess at any time of the quantities supplied to said Third Level by the Mills in operation on the said second level canal.

3. The quantity of water per second equal to fifty per centum of the mill-powers heretofore granted to be drawn from said second level canal which are not designated in the grant thereof as non-permanent powers and fifty per centum of the second quantity above named, which is not designated in the grant thereof as non-permanent powers.

A non-permanent 24 hour mill-power, as conveyed hereby being the right to take from the grantors said second level canal, during the 24 hours of the day, but exclud-

ing Sundays and Legal Holidays, the same quantity of water per second that might be drawn per second under a grant of a mill-power as defined in the accompanying Proposals, subject, however, to the limitations and restrictions set forth in this Indenture and in said Proposals.

The grantor reserves to itself, the right, in addition to the other reservations in this Indenture contained, and the said grantee, granting such right to the grantor, its successors and assigns, to enter upon the premises above described at any and all times, for the purpose of shutting off the water and to shut off the water the use of which is granted under the name of ten non-permanent 24 hour mill-[fol. 23] powers, whenever in the opinion of the Hydraulic Engineer or of such other officer or agent aforesaid there is not sufficient water flowing in said river to permit its use according to the terms of this grant.

It being understood and agreed hereby, that whenever the water is shut off as aforesaid, the grantee shall not open or suffer the gates or other appurtenances which shut off the water to be again opened, without the consent of the grantor or its proper agent as aforesaid, in writing first obtained. If said gates or other appurtenances for shutting off the water are opened or suffered to be open by the grantee its servants or agents, during the time they should be shut as hereinbefore provided, the grantee shall pay to the grantor two-hundred and fifty ($250) dollars for each occasion when said gates or other appurtenances are so opened or suffered to be open; it being hereby agreed by the parties hereto, that said sum is the amount to be paid as the liquidated damages for each opening or suffering to be open of said gates or appurtenances as aforesaid. But said sum shall be taken to be the damage for the opening or suffering to be open, said gates or other appurtenances only, and the grantor shall have the right, in addition thereto, to recover from the grantee, its successors and assigns, any and all damages which may be occasioned to the grantor or its property or for which said grantor may be made liable by said unlawful opening or suffering to be open of said gates or other appurtenances.

And the said grantor may also lock and seal the said gates or other appurtenances, whenever it shuts off the water.

To have and to hold, the above granted water rights to the said Crocker Manufacturing Company, its successors and assigns, to its and their use and behoof forever, subject, however, to the agreements, terms, conditions and all other matters and things in said annexed Proposals, and in this Indenture set forth as obligatory upon the Grantee, its successors and assigns, or their estates, and among other things, yielding and paying to the said Holyoke Water Power Company and its successors and assigns forever, as rent for each of the first three 24 hour non-permanent mill-powers above granted a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight [fol. 24] and fineness of the coinage of the year one thousand eight hundred and ninety-four, or the equivalent of this commodity in United States currency, for each and every year, payable in equal semiannual payments. Said grantee its successors and assigns shall also pay to said grantor and its successors or assigns forever as rent for each of the remaining seven 24 hour non-permanent mill-powers above granted a quantity of gold which shall be equal in amount to six hundred ($600) dollars of the gold coin of said United States of the standard of weight and fineness of the year above mentioned or the equivalent of this commodity in United States currency for each and every year, payable in equal semi-annual payments. The first payment of a quantity of gold which shall be equal in amount to forty three hundred and fifty ($4350) dollars of gold coin such as specified or the equivalent as aforesaid to be made on the first day of July A. D. 1896, and a like payment to be made every six months thereafter, viz: On the first day of January and July of every year thereafter. But it is agreed hereby, that the grantor will rebate or pay back to the grantee, at each and every semi-annual payment for each day, and proportional amount for fractions of a day, during which said grantee has been deprived of the use of said seven 24 hour non-permanent mill-powers in the manner above recited, or a part thereof, during the course of the six months then last past, a quantity of gold which shall be equal in amount to two (2) dollars of the gold coin such as above specified or the equivalent as above specified for each of said seven 24 hour non-permanent mill-powers of the use of which it or they may have been so de-

prived, and said grantor will in like manner rebate or pay back to the grantee at each and every semi-annual payment for each day, and a proportional amount for fractions of a day during which said grantee has been deprived of the use of said three 24 hour non-permanent mill-powers in the manner above recited, or a part thereof, during the course of the six months then last past, a quantity of gold which shall be equal in amount to five (5) dollars of the gold coin such as specified, or the equivalent as above specified for each of said three (3) mill-powers of the use of which it or they may have been so deprived.

And the said Holyoke Water Power Company, for itself, [fol. 25] its successors and assigns, covenant with the said Crocker Manufacturing Company, its successors and assigns, that said water rights hereby granted shall be maintained as herein proposed and provided forever.

And this grant is made upon the express condition and limitation, that the present stockholders, or any persons or corporations that may hereafter be or become stockholders of or in the said Holyoke Water Power Company, shall not be holden, bound or liable upon, or for any of the covenants, stipulations, conditions or agreements herein contained, or any thereof, or for any breach, non-fulfillment or non-observance thereof, or for any damage or loss which may be sustained or incurred by reason of such breach, non-fulfillment or non-observance; but, therefor, the said Holyoke Water Power Company in its corporate capacity, and not otherwise, shall be alone holden, obligated, bound and obliged.

The Crocker Manufacturing Company hereby grants to said Holyoke Water Power Company its successors and assigns, the right, at all times, to enter into and upon the above described premises to measure and compare the quantity of water used and wasted or suffered to waste with the quantity hereby granted.

And the said Crocker Manufacturing Company for itself, its successors and assigns hereby covenants with the said Holyoke Water Power Company that it will keep, fulfill and observe all and singular the covenants, stipulations and conditions herein contained or referred to on its part to be kept, performed and fulfilled; and that it will not nor shall its successors or assigns at any time hereafter, or for any cause or reason, make, or suffer, or cause to be made, on

any person or persons who now are, or who may hereafter be stockholder or stockholders of or in the said Holyoke Water Power Company, any claim or demand for or by reason of any breach of the covenants, stipulations or agreements herein contained or referred to on the part of the said Holyoke Water Power Company, but will look and have recourse only, to the said Holyoke Water Power Company in its Corporate capacity, and not otherwise, the present and future stockholders of the said Holyoke Water Power Company being hereby forever relieved, exempted [fol. 26] and discharged from any and all individual and personal liability or responsibility upon or for any of the covenants, stipulations and agreements herein contained or referred to; and that it, its successors or assigns, will pay or cause to be paid, the rent hereinbefore reserved to be paid at the times and in the manner hereinbfore mentioned.

And the said parties hereto mutually covenant, that they will respectively keep, observe and fulfill all the terms, covenants, conditions and other matters and things in the said annexed proposals set forth as respectively obligatory upon them or their respective successors and assigns always excepting said Eighteenth Article of said Proposals, and the obligations in Article V., to reserve the rent therein specified for mill-powers situated on the lower level and canals.

In witness whereof, the said Holyoke Water Power Company has caused its Corporate Seal to be affixed to this, and to another instrument of like tenor and date, and has caused the same to be signed by its Treasurer, the day and year first above mentioned.

And the said Crocker Manufacturing Company has caused its Corporate Seal to be affixed to this and one other instrument of like tenor and date, and has caused the same to be signed by its Treasurer the day and year first above mentioned.

Holyoke Water Power Company, by Edward S. Waters, Treasurer. (Seal.) Crocker Manuf'g Co., per C. A. Crocker, Treas. (Seal.)

Signed, sealed and delivered in presence of J. M. Jackman to both.

Approved. Gideon Wells, John B. Stebbins, Francis Goodwin, Chas. M. Beach, John M. Wheelwright, Directors Holyoke Water Power Co.

[fol. 27] COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

March 9th, A. D. 1895.

Then the above named, Edward S. Waters Treasurer, appeared and acknowledged the within instrument by him executed to be the free act and deed of the Holyoke Water Power Company. Before me

J. M. Jackman, Justice of the Peace.

HAMPDEN, ss:

April 1st, A. D. 1895.

Then the above named C. A. Crocker Treasurer, appeared and acknowledged the within instrument by him executed to be the free act and deed of the Crocker Manufacturing Company. Before me

J. M. Jackman, Justice of the Peace.

Rec'd April 2, 1895 and Recorded in Hampden County Registry of Deeds Book 533 Page 293.
Attest James R. Wells, Register.

Proposals by The Holyoke Water Power Company, for the Sale of their Mill Powers and Land, at Holyoke, Massachusetts.

Article I. The Holyoke Water Power Company propose to sell their mill powers situate at Holyoke, on the Connecticut river, on the following terms and conditions, to be varied as the parties may agree in the deed. For the price that may be agreed upon they will grant a parcel of land, to be described in the deed, with one or more mill powers of the quantity of water described below, and with the covenants of title and warranty as in the annexed deed.

Art. II. Each mill power at the respective falls is declared to be the right, during sixteen hours in a day, to draw from the nearest canal or water course of the grantors, and through the land to be granted, thirty-eight cubic feet of water per second at the upper fall, when the head and

fall there is twenty feet—or, a quantity inversely proportionate to the height, at the other falls; and in order to pre- [fol. 28] vent disputes as to the power of each mill privilege in the variations of the height of the water from changes of the seasons or other causes, it is understood and declared that the quantity of water shall be varied in proportion to the variation of the height, one foot being allowed and deducted from the height of the actual head and fall, and also from that with which it is compared before computing the proportion between them; thus on a head and fall of thirty-two feet, the quantity of water to be used would be twenty-three cubic feet and nine thirty-first parts of a cubic foot per second. And the respective parties, where either has any lawful interest therein, may at all reasonable times, in a peaceable manner, and after due notice to the principal steward or agent then on duty at any mill, enter the raceway thereof, to measure and compare the quantity of water used with the quantity granted, and in the measurement all wastage shall be included—and may also adopt and use such other mode of making or verifying the said measurement as the circumstances of each particular case may require.

Art. III. The grantors are to construct and forever keep in good repair the principal canals, and from time to time, as occasion may require, they are to remove and clear out obstructions that may accumulate therein, always excepting ice. They are also forever to maintain the dam in the Connecticut River, at the head of said principal canals, of such length and height as may be necessary, and as they may lawfully do, in order to turn the water into the canals.

Art. IV. The flumes and raceways of every mill are to be made, maintained, belong to, and be kept in good repair by the respective grantees, and each raceway shall be well spiled at the lower end thereof; and they are also to make and maintain a good and substantial gate at the head of each flume, which shall be so constructed, that when requisite, it may be closed in such a manner as to prevent water from flowing into the flume.

Art. V. In order to continue in the grantors an interest in common with the grantees, for the preservation and support of the mill powers which may be granted, and to secure a fund to indemnify the grantees for expenses which may

be incurred by them for making repairs, if the grantors should improperly neglect to make them, it is proposed [fol. 29] that part of the consideration of every sale, and all that is to be allowed the grantors for the repairs, &c., by them assumed, should be paid or secured to them in the form of a reservation of rent. It is therefore declared, that each mill power, with the land to which it is annexed, shall forever be subject to a perpetual annual rent of at least two hundred and sixty ounces troy weight of silver, of the present standard fineness of the silver coin of the United States, or an equivalent in gold, at the option of the grantee at the time of payment; which rent is to be paid in yearly payments forever, free from all charges or deduction whatever for taxes or assessments of every description, which may be assessed or levied upon any granted premises, after the making of the deed, all of which are assumed by the grantees; and a perpetual annual rent, at least equal to the above shall be reserved for every mill power hereafter sold.

Art. VI. If any grantee shall sustain any injury from deficiency of water, happening from the grantors granting more water than they can supply, failure of the dam or canal, or any cause whatever, excepting the neglect or misconduct of himself or the willful neglect and misconduct of any other person which the grantors could not lawfully prevent or control, his rent for the privilege injured may cease during the time such deficiency may continue, but no longer; and if such deficiency should happen through the misconduct or willful neglect of the grantors, the grantees shall have a right to recover damages in an action at law against the grantors, in addition to the rent to be withheld as aforesaid.

Art. VII. If any grantee shall suffer damage from want of water from causes not arising from the neglect or misconduct of himself, and which may be removed or remedied, and the grantors shall, after due notice for that purpose, unreasonably fail to remove the obstructions, or remedy the mischiefs, the grantees injured, or any of them, may in the best manner they may be able, remove or remedy the causes of injury at the grantor's expense; and to pay and indemnify them for the expense and charge thereby incurred, such grantees shall, after the expiration of thirty days from the time the amount of such expense

shall have been adjusted and agreed to by the parties, or ascertained by final judgment at law, or by award of ref- [fol. 30] erees, have a lien upon all the rents which may have been reserved to the grantors upon the sale of any mill power, and which may become payable after the expiration of said thirty days, and may demand, sue for, and receive the same, until they shall be fully reimbursed as aforesaid.

Art. VIII. The grantees are not to use more water than granted, nor waste it, nor permit it to be wasted for want of repairs, or through the deficiency of their works or otherwise; and if so wasted, or if more be used than is granted, the grantors may stop the water from entering the flumes, by closing the gates across them, or by any other method, until such waste or excessive use be sufficiently guarded against; and may also at the same time maintain their action at law for damages.

Art. IX. All buildings erected upon any land granted by the annexed deed, more than ten feet in height, are to be of stone or brick, the roofs covered with slate or some incombustible substance, and the covings well secured against fire; and if any other be erected, the grantors or their assigns may enter and abate them, and have any other appropriate remedy.

Art. X. All the land conveyed to the grantees of water power, in connection with the mill sites, shall be held, used and improved for mills, manufactories, or buildings appurtenant thereto, or for such dwelling houses, boarding houses, sheds, and other out-houses, as shall be required for the accommodation of the owners, agents, clerks, overseers, machinists, watchmen or operatives employed in such mills, and not appropriated to any other purpose whatever, nor sold nor alienated except in connection with the mill sites, and subject to all the conditions and restrictions of the original grant.

Art. XI. The grantees are not to use any building for, or to set up or continue any laboratory, powder-mill, furnace or forge, nor any chemical or other works whatever, which may be so noxious or dangerous, from fire or otherwise, as to impair, injure, or endanger the life, safety, health, or reasonable comfort of any person now or hereafter, living or employed in and about the land or works

of the grantors or their assigns or the grantees or assigns of the Hadley Falls Company, or which shall endanger the [fol. 31] buildings, property, or works, now or hereafter to be placed upon the land of the grantors, by themselves or others. And in case any such should be so set up, continued or used, the grantors or their assigns may enter and abate them, and also may sue for damages, and may likewise stop the water, as above mentioned, from passing into the flumes, until such nuisance be removed or discontinued; nor are the grantors or their assigns to set up, continue or use any such on their land so near that of the grantees, as to cause the above described mischiefs, or either of them; and should any such be set up, continued or used, the grantees or their assigns may enter and abate the same, or have any other appropriate remedy therefor, and during the continuance of such nuisance by the grantors or by their assigns, after due notice for discontinuing the same, the grantees suffering thereby, their heirs, successors or assigns, may maintain their action at law or equity, against the party setting up, using or continuing such nuisance; and if the same shall have been set up, used or continued by license from the grantors, shall also be discharged from the payment of the rent accruing during the continuance of such nuisance, but no longer, and the parties may pursue any and all of their said remedies at the same time. Provided, however, that the foregoing agreement to prevent nuisances is not to be understood to prevent the grantors or their assigns from building, using and maintaining machine shops, with the smith's forges, hammers and other things necessary, and pertaining thereto, for making all kinds of machinery, within a reasonable distance of the granted premises; nor to prohibit any grantee or his assigns from setting up and using machine shops, with all things necessary for making and repairing machinery; nor to prohibit either party or his assigns from setting up, using, enlarging, or improving any establishment for bleaching, dyeing, coloring or printing goods, with all things necessary therefor, (excepting dangerous, noxious or offensive works as aforesaid,) and no grantee shall have the right to object to the use of any building for the purposes for which it had been used before or at the time of the deed to such grantee, or to object to any building previously erected, on account of the ma-

terials of which it is composed, or the manner in which it may be built.

Art. XII. If any grantee, his heirs, successors or assigns [fol. 32] shall set up, use or continue any of the above prohibited nuisances, or shall fail to pay the rent duly, and the grantors, their successors or assigns, shall in a proper Court have recovered final judgment for damages for, or on account of such nuisance, or for the rent so in arrear, or damages for the non-payment of such rent, or if in any suit in such Court between the grantors and any of the said grantees, or their respective heirs, successors or assigns, or between either of them and any person doing any act by authority from either of them touching any such nuisance, the fact of setting up, using or continuing any such nuisance by such grantee, or by his successors or assigns, shall have been put in issue, or involved in the trial of any issue, joined in such suit, and it shall have been determined, found or proved that any such nuisance has been set up, used or continued, and the grantee, his heirs, successors or assigns, for the space of ninety days after due notice thereof, shall fail to pay and satisfy the judgment so recovered, touching said rent, or shall fail to remove and discontinue every thing which shall have been determined, found or proved to be such nuisance as aforesaid, then the mill and mill power, with all the land, and buildings attached or belonging thereto, or commonly used therewith, within or upon which any such nuisance shall have been so set up, used or continued, or for which the rent shall have been unduly withheld as aforesaid, with all the privileges and appurtenances belonging to such mill, mill power, land and buildings, shall become so far forfeited, that it shall be lawful for the grantors, or their successors or assigns to enter into and upon the said granted premises, and the same again to have, hold, possess and enjoy as of their, the grantors former estate therein; and such grantee, or his heirs, successors or assigns, and all tenants and persons claiming under him or them, to expel, and put out and remove, and to continue so to hold the same without accountability for rent, unless received, until such judgment or debt for rent or damages, shall have been paid, with interest and until all the costs and expenses of removing and abating every such nuisance shall have been reimbursed to them, together

with all costs, charges and expenses incurred in thus entering and taking and holding possession; and if such payments and reimbursements shall not be made within three [fol. 33] years from the time of the said entry, then the grantors or their successors or assigns, shall, at the expiration of that period, continue to hold the granted premises, so entered upon, to the sole use of themselves, their heirs, successors and assigns forever, without any right of redemption by the said grantee, his heirs, successors or assigns. But nothing herein contained shall be construed to bar or otherwise prevent any right of action which the grantors may have for the recovery of said rent and damages, but the remedy herein provided shall be accounted as only concurrent with that of such action or actions.

Art. XIII. In case any grantee shall bona fide sell or convey any mill power with the land originally granted therewith, or when several mill powers are granted in the same deed, and the land conveyed with them is not therein specially divided, apportioned and attached to each, if the grantee shall bona fide sell or convey any one or more of them with such part and portion of the land as shall be necessary and convenient for the profitable use and employment of the power or powers sold, leaving sufficient for the profitable use and employment of the power or powers unsold, the assignees or purchasers shall be holden to pay the rent of the mill power and land so sold, and to perform all the agreements, covenants and conditions relating thereto, and connected therewith; and the grantors will not hold the original grantees responsible therefor, unless such conveyance or assignment be made fraudulently, with the intent to defeat the grantors of any of their said rents, or of their remedies for breach of any agreements, or unless the said grantees shall reserve a rent out of the premises to themselves or others, or shall retain some estate, title, or interest therein; Provided such assignee or purchaser shall in some legal mode, bind himself and his heirs, successors and assigns to the said grantors, their successors or assigns to perform, fulfill, keep and observe, all the terms, conditions, covenants, and all other matters and things touching the property and estate assigned, which were obligatory upon the original grantee, his heirs, successors or assigns. And in case of any sale as aforesaid, of any one or more of several mill powers originally conveyed by the same deed,

with the proper and convenient sale of the land, as before stated, and the compliance by the assignee or purchaser [fol. 34] with the terms of the foregoing proviso, the premises so by such sale severed and divided, as well those so sold, as those unsold, shall be, and be considered in all respects as if the same had been originally severed in like manner, and had been granted and conveyed by the said grantors in several and distinct conveyances, and all the covenants, agreements, conditions and other things of and concerning the whole of the granted premises, shall apply to each part of said premises after such severance, in like manner as if each of said parts had been conveyed alone, the rent however reserved for all the powers granted in the original deed, to be divided proportionably to and among the powers sold and those unsold.

Art. XIV. The grantors reserve to themselves, their successors and assigns, the right to alter, modify, enlarge or expunge any of the agreements, terms, conditions or parts of the foregoing proposals, from time to time, as they may think proper, in their bargains and sales to, and agreements with subsequent purchasers, so far as to affect only the mutual rights and obligations of the grantors and such subsequent purchasers; except that a rent at least equal to the above shall be reserved for every mill power hereafter sold, unless all the prior grantees shall otherwise agree.

Art. XV. The respective heirs or successors, and the assigns of the parties, are declared to be entitled to all the rights, advantages, and forfeitures, and bound by all the obligations, duties and conditions of, and remedies against, their original parties respectively, as hereinbefore set forth, unless otherwise expressed.

Art. XVI. The stockholders, present or future, of the Holyoke Water Power Company, shall not in any way or manner, or at any time, or for any cause or reason, be holden or made individually or personally accountable upon any grants, covenants, stipulations, or agreements made or entered into by the said Holyoke Water Power Company, nor for any neglect, nonfeasance, omission, or malfeasance of the said Holyoke Water Power Company, but shall be forever exempted and relieved from all such personal liability.

Art. XVII. The grantors reserve the right to draw off the water from their canals, for the purpose of clearing out, removing obstructions therein, or repairing the same, [fol. 35] and also whenever necessary for the purpose of prosecuting and continuing the operations of the Holyoke Water Power Company, their successors and assigns, in the building of mills, and constructing the water works connected therewith, in the way usually done in similar cases, and with as little interruption in the use of the water powers conveyed to the respective grantees as the circumstances and nature of the cases may from time to time admit of. They also reserve the right to enter upon the premises of all grantees, for the purpose of laying down and repairing gas and water pipes, and for the purpose of constructing, altering or repairing such water courses and drains as a due regard to health and convenience may require. They also reserve all gas and water pipes which may exist at the time of the sale.

Art. XVIII. Any corporation or person purchasing any mill site and mill power of the Holyoke Water Power Company, shall have the right at its pleasure, to relieve itself from the payment of the annual rent above mentioned, by paying to the Holyoke Water Power Company, their successors and assigns, a sum of money sufficient to produce at the rate of six per centum per annum, an amount equal to the amount of said annual rent, which amount of money so paid shall be received, invested and retained by the Holyoke Water Power Company, its successors and assigns, as a fund towards defraying the charges and expenses of maintaining the water power and water privileges of said Company, its successors and assigns; and said fund shall be subject to the same liens for the same purposes as the rent for which it is substituted is made subject.

Art. XIX. All mill sites, mill powers and lands sold, granted, leased or conveyed to any person or corporation by the Holyoke Water Power Company are to be taken, received and held by the grantees, lessees, or purchasers thereof, and by their successors, heirs, and assigns, subject to, and with the express reservation of the legal rights of the prior grantees of the Hadley Falls Company which are in no way to be affected or changed by such sale, grant, lease

or conveyance; and, also, subject to the express condition, and to be sold and conveyed on the terms, conditions, provisos and agreements, set forth and contained in the deed, and proposals thereto annexed, of George W. Lyman, Francis Bacon, and Agustus H. Fiske, receivers of the [fol. 36] Hadley Falls Company, to Alfred Smith, bearing date on the twelfth day of March, in the year one thousand eight hundred and fifty-nine, and recorded in the Registry of Deeds for the county of Hampden, in Book 196, pages 131 and following, for the full understanding and effect whereof, reference is hereby made to said deed and proposals, and to the record thereof. And every clause, covenant, or exception contained either in these proposals or in the annexed Indenture, is to be taken and construed, consistently with the requirements of the said deed to Alfred Smith and so as not to contravene the true intent and meaning of the same or of any part thereof.

[On back:] Holyoke Water Power Co., Crocker Mfg. Co. Hampden County Registry of Deeds, Apr. 2, 1896. Received 4 H 5 M p. m.

PETITIONER'S EXHIBIT 2

No. 853

UNITED STATES OF AMERICA,
Department of State:

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the original in the archives of this Department.

(Proclamation No. 2072, dated January 31, 1934.)

In testimony whereof, I, Cordell Hull, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this eighteenth day of February, 1935.

Cordell Hull, Secretary of State, by C. E. Maclackran, Chief Clerk. (Seal.)

[fol. 37] By the President of the United States of America:

A Proclamation

Whereas, by virtue of Section 1 of the Act of Congress approved March 14, 1900 (31 Stat. L. 45), the present weight of the gold dollar is fixed at twenty five and eight tenths grains of gold nine tenths fine; and

Whereas, by Section 43, Title III of the Act approved May 12, 1933 (Public, No. 10, 73d Congress), as amended by Section 12 of the Gold Reserve Act of 1934, it is provided in part as follows:

"Whenever the President finds, upon investigation, that (1) the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any other government or governments in relation to the present standard value of gold, or (2) action under this section is necessary in order to regulate and maintain the parity of currency issues of the United States, or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments, the President is authorized, in his discretion—

"(a) To direct the Secretary of the Treasury to enter into agreements with the several Federal Reserve banks and with the Federal Reserve Board whereby the Federal Reserve Board will, and it is hereby authorized to, notwithstanding any provisions of law or rules and regulations to the contrary, permit such reserve banks to agree that they will, (1) conduct, pursuant to existing law, throughout specified periods, open market operations in obligations of the United States Government or corporations in which the United States is the majority stockholder, and (2) purchase directly and hold in portfolio for an agreed period or periods of time Treasury bills or other obligations of the United States Government in an aggregate sum of $3,000,000,000 in addition to those they may then hold, unless prior to the termination of such period or periods the Secretary shall consent to their sale. No suspension of reserve re-
[fol. 38] quirements of the Federal Reserve banks, under the terms of section 11(c) of the Federal Reserve Act, necessitated by reason of operations under this section,

shall require the imposition of the graduated tax upon any deficiency in reserves as provided in said section 11(c). Nor shall it require any automatic increase in the rates of interest or discount charged by any Federal Reserve bank, as otherwise specified in that section. The Federal Reserve Board, with the approval of the Secretary of the Treasury, may require the Federal Reserve banks to take such action as may be necessary, in the judgment of the Board and of the Secretary of the Treasury, to prevent undue credit expansion.

"(b) If the Secretary, when directed by the President, is unable to secure the assent of the several Federal Reserve banks and the Federal Reserve Board to the agreements authorized in this section, or if operations under the above provisions prove to be inadequate to meet the purposes of this section, or if for any other reason additional measures are required in the judgment of the President to meet such purposes, then the President is authorized—

* * * * * * *

"(2) By proclamation to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon, and such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued [fol. 39] or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum. Nor shall the weight of the gold dollar be fixed in

any event at more than 60 per centum of its present weight. The powers of the President specified in this paragraph shall be deemed to be separate, distinct, and continuing powers, and may be exercised by him, from time to time, severally or together, whenever and as the expressed objects of this section in his judgment may require; except that such powers shall expire two years after the date of enactment of the Gold Reserve Act of 1934 unless the President shall sooner declare the existing emergency ended, but the President may extend such period for not more than one additional year after such date by proclamation recognizing the continuance of such emergency"; and

Whereas, I find, upon investigation, that the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currencies of other governments in relation to the present standard value of gold, and that an economic emergency requires an expansion of credit; and

Whereas, in my judgment, measures additional to those provided by subsection (a) of said Section 43 are required to meet the purposes of such Section; and

Whereas, I find, from my investigation, that, in order to stabilize domestic prices and to protect the foreign commerce against the adverse effect of depreciated foreign currencies, it is necessary to fix the weight of the gold dollar at 15 5/21 grains nine tenths fine,

Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by Section 43, Title III of said Act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare and fix the weight of the gold dollar to be 15 5/21 grains nine tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation.

[fol. 40] This proclamation shall remain in force and effect until and unless repealed or modified by act of Congress or by subsequent proclamation; and notice is hereby given that I reserve the right by virtue of the authority vested in me to alter or modify this proclamation as the interest of the United States may seem to require.

In witness whereof I have hereunto set my hand [and] caused the seal of the United States to be affixed.

Done in the City of Washington at 3.10 o'clock in the afternoon, Eastern Standard Time, this 31 day of January, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the United States the one hundred and fifty-eighth.

The President:

Franklin D. Roosevelt.

Cordell Hull, Secretary of State.

PETITIONER'S EXHIBIT 3

(Certified Copy of the Provisional Regulations Issued Under the Gold Reserve Act of 1934, by the Secretary of the Treasury and Photostatic Copies of the Amendments Thereto)

UNITED STATES OF AMERICA,
Treasury Department Washington:

January 31, 1935.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed printed copy of the Provisional Regulations issued under the Gold Reserve Act of 1934 and the photostatic copies of the Amendments thereto are true copies, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld, Chief Clerk, Treasury Department.
J. W. P. (Seal.)

[fol. 41] U. S. Treasury Department, Office of the Secretary

Provisional Regulations

Issued under the Gold Reserve Act of 1934

January 30 and 31, 1934

(Seal Office of the Secretary.)

[fol. 42]

Treasury Department,
Office of the Secretary,
January 31, 1934.

Provisional Regulations

Issued under the Gold Reserve Act of 1934

Article I. General Provisions

Section 1. Authority for regulations.—These regulations, deemed necessary and proper by the Secretary of the Treasury to carry out the purposes of the Gold Reserve Act of 1934, approved January 30, 1934, are issued by the Secretary of the Treasury, with the approval of the President, under authority of said Act.

Sec. 2. Scope.—Articles II, III, IV, and V of these regulations refer particularly to section 3 of the Gold Reserve Act of 1934; and articles VI and VII refer particularly to sections 8 and 9, respectively, thereof.

The provisions of these regulations may be revoked or modified at any time and any license outstanding at the time of such revocation or modification shall be modified thereby to the extent provided in such revocation or modification.

Sec. 3. Titles and subtitles.—The titles and subtitles of these regulations are inserted for purposes of ready reference and are not to be construed as constituting a part of these regulations.

Sec. 4. Definitions.—As used in these regulations, the term—

"Act" means the Gold Reserve Act of 1934, approved January 30, 1934.

"United States" means the Government of the United States, or, where used to denote a geographical area, means

the continental United States and all other places subject to the jurisdiction of the United States.

"Continental United States" means the States of the United States, the District of Columbia, and the Territory of Alaska.

"Currency of the United States" means currency which is legal tender in the continental United States, and includes United States notes, Treasury notes of 1890, gold certificates, silver certificates, Federal Reserve notes, and circulating notes of Federal Reserve banks and national banking associations.

"Person" means any individual, partnership, association, or corporation, including the Federal Reserve Board, Federal Reserve banks, and Federal Reserve agents.

[fol. 43] "Mint" means a United States mint or assay office, and wherever authority is conferred upon a "mint" such authority is conferred upon the person locally in charge of the respective United States mint or assay office acting in accordance with the instructions of the Director of the Mint or the Secretary of the Treasury.

"Mint district" means one of the following areas:

The mint district of Philadelphia, which for the purposes of these regulations consists of the States of Illinois, Indiana, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia, and the District of Columbia.

The mint district of New York, which for the purposes of these regulations consists of the States of Connecticut, Delaware, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, and Puerto Rico, the Virgin Islands of the United States, and the Panama Canal Zone.

The mint district of Denver, which for the purposes of these regulations consists of the States of Colorado, Iowa, Kansas, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

The mint district of San Francisco, which for the purposes of these regulations consists of the States of Arizona, California, and Nevada, and the Territories and possessions of the United States not specifically included in other mint districts.

The mint district of Seattle, which for the purposes of these regulations consists of the States of Idaho, Montana, Oregon, and Washington, and the Territory of Alaska.

The mint district of New Orleans, which for the purposes of these regulations consists of the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Tennessee, and Texas.

"Gold coin" means any coin containing gold as a major element, including gold coin of a foreign country.

"Gold bullion" means any gold which has been put through a process of smelting or refining, and which is in such state or condition that its value depends primarily upon the gold content and not upon its form; but it does not include metals containing less than 5 troy ounces of fine gold per short ton, nor does it include gold coin.

"Fabricated gold" means gold which has, in good faith and not for the purpose of evading, or enabling others to evade, the provisions of the Act or of these regulations, been processed or manufactured for some one or more specific and customary industrial, professional, or artistic uses, but does not include gold coin or scrap gold.

"Scrap gold" means gold sweepings and fabricated gold, the value of which depends primarily upon its gold content [fol. 44] and not upon its form, which is no longer held for the use for which it was processed or manufactured.

Wherever reference is made in these regulations to equivalents as between dollars or currency of the United States and gold, $1 or $1 face amount of any currency of the United States equals such a number of grains of gold, nine-tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by the Act amended, twenty-five and eight-tenths grains of gold, nine-tenths fine, and thereafter such a number of grains of gold, nine-tenths fine, as the President shall have fixed under such authority.

Wherever reference is made in these regulations to "articles" or "sections", the reference is, unless otherwise indicated, to the designated articles and sections of these regulations.

Sec. 5. General provisions affecting applications, affidavits, and reports.—Every application, affidavit, and report required to be made hereunder shall be made upon the appropriate form prescribed by the Secretary of the Treas-

ury, and, except insofar as these regulations may otherwise specify, shall be executed under oath before an officer authorized to administer oaths. Duplicate copies properly executed shall be filed with the agencies designated in these regulations for that purpose. Action upon any application or affidavit may be withheld pending the furnishing of any or all of the information required in such forms or of such additional information as may be deemed necessary by the Secretary of the Treasury, or the agency authorized or directed to act hereunder. There shall be attached to the applications, affidavits, or reports such instruments as may be required by the terms thereof and such further instruments as may be required by the Secretary of the Treasury, or by such agency. Whenever additional information is requested it shall be furnished under oath.

Sec. 6. General provisions affecting licenses.—(1) Licenses issued pursuant to these regulations shall be upon the appropriate form prescribed by the Secretary of the Treasury. Licenses shall be non-transferable and shall entitle the licensee to acquire, transport, melt or treat, import, export, or earmark or hold in custody for foreign or domestic account, gold only in such form and to the extent permitted by, and subject to the conditions prescribed in, these regulations and such licenses.

(2) Licenses may be modified or revoked at any time in the discretion of the Secretary of the Treasury acting directly, or through the agency which issued the license, or any other agency designated by the Secretary of the Treasury. In the event that a license is modified or revoked (other than [fol. 45] by a modification or revocation of these regulations), the Secretary of the Treasury, or the agency through which the license was issued, or such other agency designated by the Secretary of the Treasury, shall advise the licensee by letter mailed to the address of the licensee set forth in the application. The licensee, upon receipt of such advice, shall forthwith surrender his license as directed in such advice. If the license has been modified but not revoked, the Secretary of the Treasury, or the agency through which the original license was issued, shall thereupon issue a modified license.

(3) No license issued hereunder shall authorize the licensee to hold any gold coin, or any gold melted by any

person from gold coin, unless the license contains a specific provision to that effect.

(4) No license issued hereunder shall exempt the licensee from the duty of complying with the legal requirements of any State or Territory or local authority.

(5) No license shall be issued to any person doing business under a name which, in the opinion of the Secretary of the Treasury or the designated agency issuing the license, is designed or is likely to induce the belief that gold is purchased, treated, or sold on behalf of the United States or for the purpose of carrying out any policy of the United States.

Sec. 7. General provisions affecting export licenses.—At the time any license to export gold is issued, the Federal Reserve bank or mint issuing the same shall transmit a copy thereof to the collector of customs at the port of export designated in the license. Collectors of customs shall not permit the export or transportation from the continental United States of gold in any form except upon surrender of a license to export, a copy of which has been received by him from the Federal Reserve bank or the mint issuing such license: Provided, however, That the export, or transportation from the continental United States, of fabricated gold may be permitted subject to the provisions of section 16(2): And provided further, That gold held by the Federal Reserve banks under article IV may be exported for the purposes of such article without a license. The collector of customs to whom a license to export is surrendered shall cancel such license and return it to the Federal Reserve bank or mint which issued the same. In the event that the shipment is to be made by mail, a copy of the export license shall be sent to the postmaster of the post office designated in the application, who will act under the instructions of the Postmaster General in regard thereto.

Sec. 8. General provisions affecting import licenses.—No gold in any form imported into the United States shall be permitted to enter until the person importing such gold shall have satisfied the collector of customs at the port of entry that he holds a license authorizing him to import [fol. 46] such gold or that such gold may be imported with-

out a license under the provisions of article II or IV. Postmasters receiving packages containing gold will deliver such gold subject to the instructions of the Postmaster General.

Sec. 9. Forms available.—Any form, the use of which is prescribed in these regulations, may be obtained at, or on written request to, any United States mint or assay office, Federal Reserve bank, and at the Treasury Department, Washington, D. C.

Sec. 10. Representations by licensees.—Licensees may include in public and private representations or statements the clause "licensed on form TGL—(here inserting the number of the form of license held by the licensee) pursuant to the regulations prescribed under the Gold Reserve Act of 1934", but any representation or statement which might induce the belief that the licensee is acting or is especially privileged to act on behalf of or for the United States, or is purchasing, treating, or selling gold for the United States, or in any way dealing in gold for the purpose of carrying out any policy of the United States, shall be a violation of the conditions of the license. Each agency issuing licenses hereunder which receives notice of any such representations or statements made by or with the acquiescence of any licensee shall promptly notify the Secretary of the Treasury in order that he may advise it whether or not the license of the person making such representations or statements, or permitting such representations or statements to be made, should be revoked.

Sec. 11. Penalties.—Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody in violation of the Act, or of any regulations issued thereunder, including these regulations, or of any licenses issued pursuant thereto or hereto, shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and, in addition, any person failing to comply with the provisions of the Act or of any such regulations or licenses shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

Article II. Conditions under Which Gold May Be Acquired and Held, Transported, Melted or Treated, Imported, Exported, or Earmarked or Held in Custody for Foreign or Domestic Account

Sec. 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States), only to the extent permitted by, and subject to the conditions prescribed in, these regulations or licenses issued pursuant to these regulations.

[fol. 47] Sec. 13. Transportation of gold.—Gold may be transported by carriers for persons who are licensed to hold and transport such gold or who are permitted by these regulations to hold and transport gold without a license.

Sec. 14. Gold situated outside of the United States.—Gold in any form situated outside of the United States may be acquired, transported, melted or treated, or earmarked or held in custody for foreign or domestic account without the necessity of holding a license.

Sec. 15. Gold situated in the possessions of the United States.—Gold in any form (other than United States gold coin) situated in places subject to the jurisdiction of the United States beyond the limits of the continental United States may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for the account of persons other than residents of the continental United States, by persons not domiciled in the continental United States: Provided, however, That gold may be transported from the continental United States to the possessions of the United States only under license for export issued pursuant to sections 25 (3), 32, 33, or 34, or, if fabricated gold, subject to the conditions specified in section 16(2).

Sec. 16. Fabricated gold.—(1) Fabricated gold may be acquired, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor: Provided, however, That it may be transported from the continental United States to other places subject to the jurisdiction of the United States only subject to the conditions hereinafter specified in paragraph (2) of this section.

(2) Fabricated gold may be exported, or transported from the continental United States, without the necessity of obtaining a license, provided that an affidavit shall have been executed on form TG-10 and filed in duplicate with the collector of customs at the port of shipment from the continental United States or with the postmaster at the place of mailing; and such collector or postmaster shall have endorsed on the duplicate copy of such affidavit that he is satisfied that the shipment from the continental United States is not being made for the purpose of holding or disposing of the fabricated gold outside of the continental United States primarily for the value of the gold content: Provided, further, That persons leaving the continental United States may carry with them fabricated gold owned by them and for their personal use in its frabricated form of a fine gold content not exceeding 15 ounces without the necessity of filing such affidavit or obtaining an export license.

Sec. 17. Metals containing gold.—Metals containing not more than 5 troy ounces of fine gold per short ton may be acquired, transported within the United States, imported, or held in custody for domestic account without the neces- [fol. 48] sity of obtaining a license therefor. Such metals may be melted or treated, exported, and held in custody for foreign account only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, article III.

Sec. 18. Unmelted scrap gold.—Unmelted scrap gold may be held and transported within the United States in amounts containing not more than 5 troy ounces of fine gold without the necessity of holding a license.

Sec. 19. Gold in its natural state.—Gold in its natural state (i. e., gold recovered from natural sources which has not been melted, smelted, or refined or otherwise treated by heating or by a chemical or electrical process) may be acquired, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor. Such native gold may be melted or treated or exported only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, article III.[1]

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[1] See supplement, p. 27, for amendment to this section.

Sec. 20. Rare coin.—Gold coin of recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces, unless held, together with rare and unusual coin and as part of a collection for historical, scientific, or numismatic purposes, containing not more than four quarter eagles of the same date and design, and struck by the same mint) may be acquired and held, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor. Such coin may be exported only under license on form TGL-11 issued by the Director of the Mint. Application for such a license shall be executed on form TG-11 and filed with the Director of the Mint, Washington, D. C.

Article III. Gold for Industrial, Professional, and Artistic Use

Section 21. "Twenty-five-ounce exemption."—Any person requiring gold for use in the industry, profession, or art in which he is regularly engaged may replenish his stocks of gold (in addition to fabricated gold) up to the amount actually required for a period not exceeding 3 months (but in no event in an aggregate amount exceeding 25 ounces of fine gold held at any one time) by acquisitions of gold bullion held under licenses issued pursuant to section 23, without the necessity of obtaining a license for such acquisitions; and the gold so acquired may be held, transported, melted or treated, for use by such person in his industry, profession, or art but for no other purpose. Gold may not be acquired and held under this section by persons engaged primarily or incidentally in the business of buying and selling gold other than fabricated gold.

Sec. 22. Licenses required.—Except as permitted in article II and in section 21 of this article, gold may be acquired [fol. 49] and held, transported, melted or treated, imported, exported, or earmarked for industrial, professional, or artistic use only to the extent permitted by licenses issued under section 23 hereof.

Sec. 23. Purposes for which licenses shall be issued.—The mints shall issue licenses authorizing the acquisition and holding, transportation, melting and treating, importing, exporting, and holding for domestic account of gold

which the mint is satisfied is required for legitimate and customary use in industry, profession, or art, by an applicant regularly engaged in the mint district of such mint (1) in the business of furnishing or processing gold for industry, profession, or art, or for sale to the United States, (2) in an industry, profession, or art in which stocks of gold in excess of 25 fine ounces are required to be maintained by the applicant.

Sec. 24. Applications.—Every application for a license under section 23 shall be made on form TG-12 (except that applications for export shall be made on form TG-15) and shall be filed in duplicate with the United States mint for the mint district in which is located the applicant's principal place of business. No person shall make application to more than one mint; and, in the event any one person is, through misrepresentation or mistake, issued a license under this article by more than one mint, all licenses issued to such person shall be void from the date of issuance to such person of a license by a second mint. Every applicant for a license under section 23 shall state in his application whether or not any applications have been filed by or licenses issued to any partnership, association, or corporation in which the applicant has a substantial interest or if the applicant is a partnership, association, or corporation, by or to a person having a substantial interest in such partnership, association, or corporation. No mint shall issue any license to any person if in its judgment more than one license for the same purpose will be held for the principal use or benefit of the same persons or interests. Any person licensed under this article acquiring a principal interest in any partnership, association, or corporation holding a license under this article for this purpose shall immediately so inform the mints which issued the licenses.

Sec. 25. Licenses.—(1) Upon receipt of the application and after making such investigation of the case as it may deem advisable, the mint, if satisfied that gold is necessary for the legitimate and customary requirements of the applicant's industry, profession, art, or business, shall issue to the applicant a license on form TGL-12, TGL-13, or TGL-14, whichever is designated in rulings of the Secretary of the Treasury for the kind of business, industry, profession, or art in which the applicant is engaged.

[fol. 50] (2) Licenses issued under this article may entitle the licensee to acquire and hold not to exceed a maximum amount specified therein, which amount shall not be greater than the estimated requirements of the licensee for a period of 3 months; and such license may authorize the licensee to transport such gold from place to place within the United States, melt or treat it to the extent necessary to meet the requirements of the industry, profession, or art for which it was acquired and held or otherwise to carry out the purposes for which it is held under license, and may authorize the licensee to import gold so long as the maximum amount of gold held after importation does not exceed the maximum amount authorized by the license to be held.

(3) No license on form TGL-12, TGL-13, or TGL-14, shall authorize the licensee to export or transport from the continental United States, without a supplementary license on form TGL-15 issued by the mint which issued the license on form TGL-12, TGL-13, or TGL-14, gold in any form (except that fabricated gold maybe exported or transported from the continental United States subject to the conditions specified in section 16 (2)). Export licenses on form TGL-15 shall be issued only with the approval of the Secretary of the Treasury, and upon application made on form TG-15 showing to the satisfaction of the mint and the Secretary of the Treasury that the export or transport from the continental United States is for a specific and customary industrial, professional, or artistic use connected with the applicant's business, and not for the purpose of using or holding or disposing of such gold beyond the limits of the continental United States as, or in lieu of, money, or for the value of its gold content.

(4) No license issued under this article shall entitle the licensee to acquire and hold, transport, melt or treat, import or export, or hold in custody any gold coin.

Sec. 26. Records.—Every person holding a license issued pursuant to section 23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date, and description of each such acquisition and delivery, and such

records shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold.

Sec. 27. Reports.—Every person holding a license on form TGL-12, TGL-13, or TGL-14 shall file with the mint [1] which issued his license, on or before the 15th day of February, May, August, and November, a report on form TGR-12, TGR-13, or TGR-14, respectively, for the quarter ending on the first day of such months.

[fol. 51] Article IV. Gold for the Purpose of Settling International Balances, and for Other Purposes

Sec. 28. The Federal Reserve banks may from time to time acquire from the United States by redemption of gold certificates in accordance with section 6 of the Act, such amounts of gold bullion as, in the judgment of the Secretary of the Treasury, are necessary to settle international balances or to maintain the equal purchasing power of every kind of currency of the United States. Such banks may also acquire gold abroad or may acquire gold in the United States which has not been held in noncompliance with the Executive orders, or the orders of the Secretary of the Treasury, issued under sections 2 and 3 of the Act of March 9, 1933, entitled "An act to provide relief in the existing national emergeney in banking and for other purposes", or in noncompliance with any regulations or rulings made thereunder or licenses issued pursuant thereto, or acquired and held, transported, melted or treated, imported, exported, earmarked or held in custody for foreign or domestic account in violation of the Act or regulations issued thereunder, including these regulations.

Sec. 29. The gold acquired under section 28 may be held, transported, imported, exported, or earmarked or held in custody for foreign or domestic account for the purposes of settling international balances or maintaining the equal purchasing power of every kind of currency of the United States: Provided, That if the gold is not used for such purposes within 6 months from the date of acquisition, it

[1] Instructions have since been issued instructing licensees to file such reports with the Director of the Mint, Washington, D. C.

shall (unless the Secretary of the Treasury shall have extended the period within which such gold may be so held) be paid and delivered to the Treasurer of the United States against payment therefor by credits in equivalent amounts in dollars in the accounts authorized under the sixteenth paragraph of section 16 of the Federal Reserve Act, as amended.

Sec. 30. The provisions of this article shall not be construed to permit any person subject to the jurisdiction of the United States, other than a Federal Reserve bank, to acquire gold for the purposes specified in this article, or to permit any person to acquire gold from a Federal Reserve bank except to the extent that his license issued hereunder specifically so provides.

Article V. Gold for Other Purposes Not Inconsistent with the Purposes of the Gold Reserve Act of 1934

Sec. 31. Licenses required.—Gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account, for purposes other than those specified in articles III [fol. 52] and IV not inconsistent with the purposes of the Act only to the extent permitted in article II or under a license issued under section 32, 33, or 34.

Sec. 32. Gold imported in gold-bearing materials for reexport.—The United States assay office at New York or the United States mint at San Francisco shall issue licenses on form TGL-16, authorizing the export of gold which such assay office or mint is satisfied was refined (or is equivalent to gold refined) from gold-bearing materials imported into the United States, provided such gold is imported, acquired, and held, transported, melted and treated as permitted in article II or in accordance with a license issued under section 23 hereof and subject to the following provisions:

(1) Notation upon entry.—Upon the formal entry into the United States of any gold-bearing materials, the importer shall declare to the collector of customs at the port where the material is formally entered that the importation is made with the intention of exporting the gold refined therefrom. The collector shall make on the entry a notation to this effect and forward a copy of the entry to the United

States assay office at New York or to the United States mint at San Francisco, whichever is designated by the importer.

(2) Sampling and assaying.—Promptly upon the receipt of each importation of gold-bearing material at the plant where it is first to be treated, it shall be weighed, sampled, and assayed for the gold content. A reserve commercial sample shall be retained by such plant for at least 1 year from the date of importation, unless the assay is sooner verified by the Treasury Department.

(3) Plant records.—The importer shall cause an exact record, covering each importation, to be kept at the plant of first treatment. The records shall show the gross wet weight of the importation, the weight of containers, if any, the net wet weight, the percentage and weight of moisture, the net dry weight, and the gold content shown by the settlement assay. An attested copy of such record shall be filed promptly with the assay office at New York or the mint at San Francisco, whichever has been designated to receive a copy of the entry. The plant records herein required to be kept shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold.

(4) Application for export license.—Not later than 3 months from the date of entry the importer shall file with the New York assay office or the mint at San Francisco, whichever has been designated to receive a copy of the entry, an application on form TG-16 for a permit to export refined gold not in excess of the amount shown by the settlement sheet covering the importation. The application shall be accompanied by two duly attested copies of the settlement sheet.

[fol. 53] (5) Issuance of serial numbered certificates.—If the mint is satisfied as to the accuracy of the data shown on such application, it shall issue to the importer a dated serial numbered certificate, which shall show the amount of gold specified by the application and the amount specified by the settlement sheet. The Director of the Mint shall prescribe the form of such certificate.

(6) Issuance of export license.—Upon delivery of the serial numbered certificate to the assay office at New York or to the mint at San Francisco, whichever has issued the

certificate, within 120 days from the date the certificate was issued, the mint shall issue to the applicant an export license on form TGL-16 to export refined gold in an amount not exceeding the amount specified in the settlement sheet as shown on such certificate.

(7) Exportation prior to receipt of settlement sheet.—Upon a showing in the application that an exportation with respect to any gold-bearing materials imported into the United States for refining is necessary prior to the time the settlement sheet can be procured, the assay office at New York or the mint at San Francisco, whichever was designated by the importer, may receive the application with duplicate certified copies of the report of the applicant's actual test assay. If prior reports of such applicant have been approximately substantiated by the settlement sheets, a license to export up to 90 percent of the amount of gold which such report estimates will be realized from such gold-bearing materials may be granted.

Sec. 33. Gold imported for reexport.—Gold may be imported, transported, and exported without the necessity of holding a license, provided the gold remains under customs custody throughout the period during which it is within the customs limits of the United States. Except as provided in the foregoing sentence, gold may be imported for reexport, held, and transported within the United States under the provisions of this section only under license. The United States assay office at New York or the United States mint at San Francisco may, subject to the following provisions, issue licenses on form TGL-17 authorizing the importation, holding, transportation, and exportation of gold which the office or mint is satisfied is imported for prompt reexport.

(1) Notation upon entry.—Upon the formal entry into the United States of gold intended for prompt reexport, the importer shall declare to the collector of customs at the port where the gold is formally entered that it is entered for prompt reexport. The collector shall make a notation of this declaration upon the entry and forward a copy of the entry to the assay office at New York or the mint at San Francisco, whichever is designated by the importer.

[fol. 54] (2) Application for license.—The importer shall forthwith file an application on form TG-17 with the assay

office at New York or the mint at San Francisco, whichever has been designated to receive a copy of the entry.

(3) License.—Upon receipt of the application and after making such investigation of the case as it may deem advisable, the assay office or mint to which the application is made, if satisfied that the gold was imported for prompt reexport, shall issue to the applicant a license on form TGL–17.

Sec. 34. The Secretary of the Treasury, with the approval of the President, shall issue licenses authorizing the acquisition, transportation, melting or treating, importing, exporting, or earmarking or holding in custody for foreign or domestic account of gold, for purposes other than those specified in articles III and IV, and sections 32 and 33 of this article, which, in the judgment of the Secretary of the Treasury, are not inconsistent with the purposes of the Act, subject to the following provisions:

(1) Applications.—Every application for a license under this section shall be made on form TG-18 and shall be filed in duplicate with the Federal Reserve bank for the district in which the applicant resides or has his principal place of business. Upon receipt of the application and after making such investigation of the case as it may deem advisable, the Federal Reserve bank shall transmit to the Secretary of the Treasury the original of the application, together with any supplemental information it may deem appropriate. The Federal Reserve bank shall retain the duplicate of the application for its records.

(2) Licenses.—If the issuance of a license is approved, the Federal Reserve bank which received and transmitted the application will be advised by the Secretary of the Treasury and directed to issue a license on form TGL–18. If a license is denied, the Federal Reserve bank will be so advised and shall immediately notify the applicant. The decision of the Secretary of the Treasury with respect to the granting or denying of a license shall be final. If a license is granted, the Federal Reserve bank shall thereupon note upon the duplicate of the application therefor, the date of approval and issuance and the amount of gold specified in such license.

(3) Reports.—Within 7 days of the disposition of the gold acquired or held under a license issued under this

section, or within 7 days of export, if such exportation is authorized, the licensee shall file a report in duplicate on form TGR–18 with the Federal Reserve bank through which the license was issued. Upon receipt of such report, the Federal Reserve bank shall transmit the original thereof to the Secretary of the Treasury and retain the duplicate for its records.

[fol. 55]

Treasury Department,
Office of the Secretary,
August 26, 1935.

Amendment to Provisional Regulations

Issued under the Gold Reserve Act of 1934

The Provisional Regulations issued under the Gold Reserve Act of 1934, as amended, are hereby further amended, effective from the time of approval by the President of this amendment, in the following respects:

Section 28 is amended to read as follows:

"Sec. 28. The Federal Reserve banks may from time to time acquire from the United States by redemption of gold certificates in accordance with section 6 of the Act, such amounts of gold bullion as, in the judgment of the Secretary of the Treasury, are necessary to settle international balances or to maintain the equal purchasing power of every kind of currency of the United States. Such banks may also acquire gold *(other than United States gold coin)* abroad or may acquire gold *(other than United States gold coin)* in the United States which has not been held in noncompliance with the Executive orders, or the orders of the Secretary of the Treasury, issued under sections 2 and 3 of the Act of March 9, 1933, entitled 'An act to provide relief in the existing national emergency in banking and for other purposes', or in noncompliance with any regulations or rulings made thereunder or licenses issued pursuant thereto, or acquired and held, transported, melted or treated, imported, exported, earmarked or held in custody for foreign or domestic account in violation of the Act or regulations issued thereunder, including these regulations."

Section 35 is amended to read as follows:

"Sec. 35. The mints, subject to the conditions specified in these regulations, and the general regulations governing the mints, are authorized to purchase:

[fol. 56] (a) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use;

(b) Unmelted scrap gold;

(c) Gold *(other than United States gold coin)* imported into the United States after January 30, 1934; and

(d) Such other gold *(other than United States gold coin)* as may be authorized from time to time by rulings of the Secretary of the Treasury.

Provided, however, That no gold shall be purchased by any mint or assay office under the provisions of this article which, in the opinion of the mint, has been held at any time in noncompliance with the Act of March 9, 1933, any Executive orders or orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto or which, in the opinion of the mint, has been acquired and held, transported, melted or treated or held in custody in violation of the Act or of regulations issued thereunder, including these regulations."

H. Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt, The White House, August 26, 1935, 8 P. M. Eastern Standard Time.

[fol. 57] Article VI. Purchase of Gold by Mints

Sec. 35. The mints, subject to the conditions specified in these regulations, and the general regulations governing the mints, are authorized to purchase:

(a) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use;

(b) Unmelted scrap gold;

(c) Gold imported into the United States after January 30, 1934; and

(d) Such other gold as may be authorized from time to time by rulings[1] of the Secretary of the Treasury; Provided, however, That no gold shall be purchased by any mint or assay office under the provisions of this article which, in the opinion of the mint, has been held at any time in noncompliance with the act of March 9, 1933, any Executive orders or orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto or which, in the opinion of the mint, has been acquired and held, transported, melted or treated or held in custody in violation of the Act or of regulations issued thereunder, including these regulations.

Sec. 36. Deposits.—Gold in the form of unmelted scrap gold, coins, bars, kings, and buttons will be received in amounts of not less than one troy ounce of fine gold. Gold in the form of retort sponge, lumps, nuggets, grains, and dust, in their native state free from earth and stone, or nearly so, will be received in amounts of not less than two troy ounces of fine gold. Deposits of gold shall not contain less than 200 parts of gold in 1,000 by assay. In the case of gold forwarded to a mint by mail or express, a letter of transmittal shall be sent with each package. When there is a material discrepancy between the actual and invoice weights of a deposit, further action in regard to it will be deferred pending communication with the depositor.

Sec. 37. Rejection of gold by mint.—Deposits of gold which do not conform to the requirements of sections 35 or 36, or which otherwise are unsuitable for mint treatment shall be rejected and returned to the person delivering the same at his risk and expense. Any deposit of gold which has been held at any time in noncompliance with the act of March 9, 1933, any Executive orders or orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto, or in noncompliance with the Act and any regulations issued thereunder, including

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[1] See supplement, pp. 28, 29, 30, 31, for General Rulings issued under this section.

these regulations, or any licenses issued pursuant thereto [fol. 58] or hereto may be held subject to the penalties provided in section 12 hereof, or sections 2 or 3 of said act of March 9, 1933.

Sec. 38. Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof.—(1) The mints shall not purchase any gold under clause (a) of section 35 unless the deposit of such gold is accompanied by a properly executed affidavit as follows:

An affidavit on form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States or any place subject to the jurisdiction thereof: Provided, however, That such persons delivering gold in the form of nuggets or dust having an aggregate weight of not more than 5 ounces, which they have recovered from mining or panning in the United States or any place subject to the jurisdiction thereof, may accompany such delivery with full and complete information on form TG-19 without the requirement of an oath.

An affidavit on form TG-20 shall be filed with each delivery of gold by persons who have recovered such gold from gold-bearing materials in the regular course of their business of operating a custom mill, smelter, or refinery.

An affidavit on form TG-21 together with a statement also under oath giving (a) the names of the persons from whom gold was purchased; (b) amount and description of each lot of gold purchased; (c) the location of the mine or placer deposit from which each lot was taken; and (d) the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold.

In addition such persons shall show that the gold was acquired, held, melted and treated, and transported by them in accordance with a license issued pursuant to section 23 hereof, or that such acquisition, holding, melting and treating, and transportation is permitted under article II without necessity of holding a license.

Sec. 39. Unmelted scrap gold.—No deposit of unmelted scrap gold shall be accepted unless accompanied by a

properly executed affidavit on form TG-22. In addition the depositors of such gold shall establish to the satisfaction of the mint that the gold was acquired, held, and transported by them in accordance with a license issued pursuant to these regulations.

Sec. 40. Imported gold.—The mints are authorized to purchase only such gold imported into the United States as has been in customs custody throughout the period in which it shall have been situated within the customs limits of the continental United States, and then only subject to the following provisions:

(1) Notation upon entry.—Upon formal entry into the United States of any gold intended for sale to a mint under [fol. 59] this article, the importer shall declare to the collector of customs at the port of entry where the gold is formally entered that the gold is entered for such sale. The collector shall make a notation of this declaration upon the entry and forward a copy to the mint designated by the importer.

(2) Upon the deposit of the gold with the mint designated by the importer, the importer shall file an affidavit executed in duplicate on form TG-23.

Sec. 41. Records and reports.—Every person delivering gold in accordance with this article, who is required to be licensed to hold gold, shall keep an exact record of all gold mined, acquired, and all deliveries of gold made by such person as provided in section 26 hereof and shall file with the mint which issued the license the reports required under section 27 hereof. The mints shall not purchase gold under the provisions of this article from any person who has failed to comply with these regulations or the terms of his license.

Sec. 42. Purchase price.—The mints shall pay for all gold purchased by them in accordance with this article $35.00 (less one fourth of 1 percent) per troy ounce of fine gold, but shall retain from such purchase price an amount equal to all mint charges. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints.

Article VII. Sale of Gold by Mints

Sec. 43. Each mint is authorized to sell gold to persons licensed by it to acquire such gold for use in industry, profession, or art: Provided, however, That no mint may sell gold to any person in an amount which, in the opinion of such mint, exceeds the amount actually required by such licensee for a period of 3 months. Prior to the sale of any gold under this article, the mint shall require the purchaser to execute and file in duplicate an affidavit on form TG–24, or, if such purchaser is in the business of furnishing gold for use in industries, professions, and arts, on form TG–25. The mints are authorized to refuse to sell gold in amounts less than 25 ounces, and shall not sell gold under the provisions of this article to any person who has failed to comply with these regulations or the terms of his license.

Sec. 44. Sale price.—The mints shall charge for all gold sold under this article $35.00 (plus one fourth of 1 percent) per troy ounce of fine gold. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints.

[fol. 60] Article VIII. Transitory Provisions[1]

Sec. 45. Licenses issued by the United States mints and assay offices on Form TGL-4 and TGL-4A, shall until March 15, 1934, be deemed licenses under section 23 hereof. Such licenses on Form TGL-4 will authorize the licensee until March 15, 1934, to acquire—

(1) gold held under License TGL-4 or TGL-4A or under License TGL-12, TGL-13, or TGL-14 issued pursuant to these regulations;

(2) unmelted scrap gold from persons who acquired and hold such gold lawfully; or

(3) gold bullion from the mint which issued his licenses; and to hold, transport, melt and treat, gold now lawfully held or so acquired in amounts authorized by the license. Such licenses on Form TGL-4A will authorize the licensee until March 15, 1934, to acquire unmelted scrap gold—

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[1] See supplement, p. 27, for amendments to this article.

(1) held under License TGL-4A or under License TGL-12, issued pursuant to these regulations; or

(2) from persons who acquired and hold unmelted scrap gold lawfully;

and to hold and transport unmelted scrap gold now lawfully held or so acquired in amounts authorized by the license.

Sec. 46. Licenses to hold gold in custody, issued by direction of the Secretary of the Treasury on forms TGL-1 and TGL-2 up to and including March 15, 1934, shall be deemed licenses to hold such gold in custody subject to the conditions prescribed therein, unless sooner terminated by the terms thereof.

Henry Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt, The White House.

Articles I, II, III, IV, V, and VIII approved January 30, 1934.

Articles VI and VII approved January 31, 1934.

[fol. 61] Gold Reserve Act of 1934

An Act To protect the currency system of the United States, to provide for the better use of the monetary gold stock of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "Gold Reserve Act of 1934."

Sec. 2. (a) Upon the approval of this Act all right, title, and interest, and every claim of the Federal Reserve Board, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion shall pass to and are hereby vested in the United States; and in payment therefor credits in equivalent amounts in dollars are hereby established in the Treasury in the accounts authorized under the sixteenth paragraph of section 16 of the Federal Reserve Act, as heretofore and by this Act amended (U. S. C., title 12, sec. 467). Balances in such accounts shall be payable in gold certificates, which shall be in such form and in such denominations as

the Secretary of the Treasury may determine. All gold so transferred, not in the possession of the United States, shall be held in custody for the United States and delivered upon the order of the Secretary of the Treasury; and the Federal Reserve Board, the Federal Reserve banks, and the Federal Reserve agents shall give such instructions and shall take such action as may be necessary to assure that such gold shall be so held and delivered.

(b) Section 16 of the Federal Reserve Act, as amended, is further amended in the following respects:

(1) The third sentence of the first paragraph is amended to read as follows: "They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank."

(2) So much of the third sentence of the second paragraph as precedes the proviso is amended to read as follows: "The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances acquired under the provisions of section 13 of this Act, or bills of exchange endorsed by a member bank of any Federal Reserve district and purchased under the provisions of section 14 of this Act, or bankers' acceptances purchased under the provisions of said section 14, or gold certificates:".

(3) The first sentence of the third paragraph is amended to read as follows: "Every Federal Reserve bank shall maintain reserves in gold certificates or lawful money of not less than 35 per centum against its deposits, and reserves in gold certificates of not less than 40 per centum against its Federal Reserve notes in actual circulation: Provided, however, That when the Federal Reserve agent holds gold certificates as collateral for Federal Reserve notes issued to the bank such gold certificates shall be counted as part of the reserve which such bank is required to maintain against its Federal Reserve notes in actual circulation."

[fol. 62] (4) The fifth and sixth sentences of the third paragraph are amended to read as follows: "Notes presented for redemption at the Treasury of the United States shall be paid out of the redemption fund and returned to the Federal Reserve banks through which they were orig-

inally issued, and thereupon such Federal Reserve bank shall, upon demand of the Secretary of the Treasury, reimburse such redemption fund in lawful money or, if such Federal Reserve notes have been redeemed by the Treasurer in gold certificates, then such funds shall be reimbursed to the extent deemed necessary by the Secretary of the Treasury in gold certificates, and such Federal Reserve bank shall, so long as any of its Federal Reserve notes remain outstanding, maintain with the Treasurer in gold certificates an amount sufficient in the judgment of the Secretary to provide for all redemptions to be made by the Treasurer. Federal Reserve notes received by the Treasurer otherwise than for redemption may be exchanged for gold certificates out of the redemption fund hereinafter provided and returned to the Reserve bank through which they were originally issued, or they may be returned to such bank for the credit of the United States."

(5) The fourth, fifth, and sixth paragraphs are amended to read as follows:

"The Federal Reserve Board shall require each Federal Reserve bank to maintain on deposit in the Treasury of the United States a sum in gold certificates sufficient in the judgment of the Secretary of the Treasury for the redemption of the Federal Reserve notes issued to such bank, but in no event less than 5 per centum of the total amount of notes issued less the amount of gold certificates held by the Federal Reserve agent as collateral security; but such deposit of gold certificates shall be counted and included as part of the 40 per centum reserve hereinbefore required. The Board shall have the right, acting through the Federal Reserve agent, to grant in whole or in part, or to reject entirely the application of any Federal Reserve bank for Federal Reserve notes; but to the extent that such application may be granted the Federal Reserve Board shall, through its local Federal Reserve agent, supply Federal Reserve notes to the banks so applying, and such bank shall be charged with the amount of the notes issued to it and shall pay such rate of interest as may be established by the Federal Reserve Board on only that amount of such notes which equals the total amount of its outstanding Federal Reserve notes less the amount of gold certificates held by the Federal Reserve agent as collateral security. Federal

Reserve notes issued to any such bank shall, upon delivery, together with such notes of such Federal Reserve bank as may be issued under section 18 of this Act upon security of United States 2 per centum Government bonds, become a first and paramount lien on all the assets of such bank.

"Any Federal Reserve bank may at any time reduce its liability for outstanding Federal Reserve notes by depositing with the Federal Reserve agent its Federal Reserve notes, gold certificates, or lawful money of the United States. Federal Reserve notes so deposited shall not be reissued, except upon compliance with the conditions of an original issue.

"The Federal Reserve agent shall hold such gold certificates or lawful money available exclusively for exchange [for. 63] for the outstanding Federal Reserve notes when offered by the Reserve bank of which he is a director. Upon the request of the Secretary of the Treasury the Federal Reserve Board shall require the Federal Reserve agent to transmit to the Treasurer of the United States so much of the gold certificates held by him as collateral security for Federal Reserve notes as may be required for the exclusive purpose of the redemption of such Federal Reserve notes, but such gold certificates when deposited with the Treasurer shall be counted and considered as if collateral security on deposit with the Federal Reserve agent."

(6) The eighth paragraph is amended to read as follows:

"All Federal Reserve notes and all gold certificates and lawful money issued to or deposited with any Federal Reserve agent under the provisions of the Federal Reserve Act shall hereafter be held for such agent, under such rules and regulations as the Federal Reserve Board may prescribe, in the joint custody of himself and the Federal Reserve bank to which he is accredited. Such agent and such Federal Reserve bank shall be jointly liable for the safekeeping of such Federal Reserve notes, gold certificates, and lawful money. Nothing herein contained, however, shall be construed to prohibit a Federal Reserve agent from depositing gold certificates with the Federal Reserve Board, to be held by such Board subject to his order, or with the Treasurer of the United States for the purposes authorized by law."

(7) The sixteenth paragraph is amended to read as follows:

"The Secretary of the Treasury is hereby authorized and directed to receive deposits of gold or of gold certificates with the Treasurer or any Assistant Treasurer of the United States when tendered by any Federal Reserve bank or Federal Reserve agent for credit to its or his account with the Federal Reserve Board. The Secretary shall prescribe by regulation the form of receipt to be issued by the Treasurer or Assistant Treasurer to the Federal Reserve bank or Federal Reserve agent making the deposit, and a duplicate of such receipt shall be delivered to the Federal Reserve Board by the Treasurer at Washington upon proper advices from any Assistant Treasurer that such deposit has been made. Deposits so made shall be held subject to the orders of the Federal Reserve Board and shall be payable in gold certificates on the order of the Federal Reserve Board to any Federal Reserve bank or Federal Reserve agent at the Treasury or at the Subtreasury of the United States nearest the place of business of such Federal Reserve bank or such Federal Reserve agent. The order used by the Federal Reserve Board in making such payments shall be signed by the governor or vice governor, or such other officers or members as the Board may by regulation prescribe. The form of such order shall be approved by the Secretary of the Treasury."

(8) The eighteenth paragraph is amended to read as follows:

"Deposits made under this section standing to the credit of any Federal Reserve bank with the Federal Reserve Board shall, at the option of said bank, be counted as part of the lawful reserve which it is required to maintain against outstanding Federal Reserve notes, or as a part of the reserve it is required to maintain against deposits."

Sec. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired [fol. 64] and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the

purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked, or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

Sec. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

Sec. 5. No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C., title 31, sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct.

Sec. 6. Except to the extent permitted in regulations which may be issued hereunder by the Secretary of the Treasury with the approval of the President, no currency of the United States shall be redeemed in gold: Provided, however, That gold certificates owned by the Federal Reserve banks shall be redeemed at such times and in such amounts as, in the judgment of the Secretary of the Treasury, are necessary to maintain the equal purchasing power

of every kind of currency of the United States: And provided further, That the reserve for United States notes and for Treasury notes of 1890, and the security for gold certificates (including the gold certificates held in the Treasury for credits payable therein) shall be maintained in gold bullion equal to the dollar amounts required by law, and the reserve for Federal Reserve notes shall be maintained in gold certificates, or in credits payable in gold certificates maintained with the Treasurer of the United States under section 16 of the Federal Reserve Act, as heretofore and by this Act amended.

No redemptions in gold shall be made except in gold bullion bearing the stamp of a United States mint or assay office in an amount equivalent at the time of redemption to the currency surrendered for such purpose.

Sec. 7. In the event that the weight of the gold dollar shall at any time be reduced, the resulting increase in value [fol. 65] of the gold held by the United States (including the gold held as security for gold certificates and as a reserve for any United States notes and for Treasury notes of 1890) shall be covered into the Treasury as a miscellaneous receipt; and, in the event that the weight of the gold dollar shall at any time be increased, the resulting decrease in value of the gold held as a reserve for any United States notes and for Treasury notes of 1890, and as security for gold certificates shall be compensated by transfers of gold bullion from the general fund, and there is hereby appropriated an amount sufficient to provide for such transfers and to cover the decrease in value of the gold in the general fund.

Sec. 8. Section 3700 of the Revised Statutes (U. S. C., title 31, sec. 734) is amended to read as follows:

"Sec. 3700. With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin, or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; any provision of law relating to the maintenance of parity, or limiting the purposes for which any of such obligations, coin, or currency, may be issued, or requiring any such obligations to

be offered as a popular loan or on a competitive basis, or to be offered or issued at not less than par, to the contrary notwithstanding. All gold so purchased shall be included as an asset of the general fund of the Treasury."

Sec. 9. Section 3699 of the Revised Statutes (U. S. C., title 31, sec. 733) is amended to read as follows:

"Sec. 3699. The Secretary of the Treasury may anticipate the payment of interest on the public debt, by a period not exceeding one year, from time to time, either with or without a rebate of interest upon the coupons, as to him may seem expedient; and he may sell gold in any amounts, at home or abroad, in such manner and at such rates and upon such terms and conditions as he may deem most advantageous to the public interest, and the proceeds of any gold so sold shall be covered into the general fund of the Treasury: Provided, however, That the Secretary of the Treasury may sell the gold which is required to be maintained as a reserve or as security for currency issued by the United States, only to the extent necessary to maintain such currency at a parity with the gold dollar."

Sec. 10. (a) For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purpose of this section. An annual audit of such funds shall be made and a report thereof submitted to the President.

(b) To enable the Secretary of the Treasury to carry out the provisions of this section there is hereby appropriated, out of the receipts which are directed to be covered into the Treasury under section 7 hereof, the sum of $2,000,000,000, which sum when available shall be deposited with the Treasurer of the United States in a stabilization fund (hereinafter called the "fund") under the exclusive control of the Secretary of the Treasury, with the approval of the [fol. 66] President, whose decisions shall be final and not be subject to review by any other officer of the United States. The fund shall be available for expenditure, under the direction of the Secretary of the Treasury and in his

discretion, for any purpose in connection with carrying out the provisions of this section, including the investment and reinvestment in direct obligations of the United States of any portions of the fund which the Secretary of the Treasury, with the approval of the President, may from time to time determine are not currently required for stabilizing the exchange value of the dollar. The proceeds of all sales and investments and all earnings and interest accruing under the operations of this section shall be paid into the fund and shall be available for the purposes of the fund.

(c) All the powers conferred by this section shall expire two years after the date of enactment of this Act, unless the President shall sooner declare the existing emergency ended and the operation of the stabilization fund terminated; but the President may extend such period for not more than one additional year after such date by proclamation recognizing the continuance of such emergency.

Sec. 11. The Secretary of the Treasury is hereby authorized to issue, with the approval of the President, such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act.

Sec. 12. Paragraph (b) (2), of section 43, title III, of the Act approved May 12, 1933 (Public, Numbered 10, Seventy-third Congress), is amended by adding two new sentences at the end thereof, reading as follows:

"Nor shall the weight of the gold dollar be fixed in any event at more than 60 per centum of its present weight. The powers of the President specified in this paragraph shall be deemed to be separate, distinct, and continuing powers, and may be exercised by him, from time to time, severally or together, whenever and as the expressed objects of this section in his judgment may require; except that such powers shall expire two years after the date of enactment of the Gold Reserve Act of 1934 unless the President shall sooner declare the existing emergency ended, but the President may extend such period for not more than one additional year after such date by proclamation recognizing the continuance of such emergency."

Paragraph (2) of subsection (b) of section 43, title III, of an act entitled "An act to relieve the existing national

economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended by adding at the end of said paragraph (2) the following:

"The President, in addition to the authority to provide for the unlimited coinage of silver at the ratio so fixed, under such terms and conditions as he may prescribe, is further authorized to cause to be issued and delivered to the tenderer of silver for coinage, silver certificates, in lieu of the standard silver dollars to which the tenderer would be entitled and in an amount in dollars equal to the number of coined standard silver dollars that the tenderer of such silver for coinage would receive in standard silver dollars. [fol. 67] "The President is further authorized to issue silver certificates in such denominations as he may prescribe against any silver bullion, silver, or standard silver dollars in the Treasury not then held for redemption of any outstanding silver certificates, and to coin standard silver dollars or subsidiary currency for the redemption of such silver certificates.

"The President is authorized, in his discretion, to prescribe different terms and conditions and to make different charges, or to collect different seigniorage, for the coinage of silver of foreign production than for the coinage of silver produced in the United States or its dependencies. The silver certificates herein referred to shall be issued, delivered, and circulated substantially in conformity with the law now governing existing silver certificates, except as may herein be expressly provided to the contrary, and shall have and possess all of the privileges and the legal tender characteristics of existing silver certificates now in the Treasury of the United States, or in circulation.

"The President is authorized, in addition to other powers, to reduce the weight of the standard silver dollar in the same percentage that he reduces the weight of the gold dollar.

"The President is further authorized to reduce and fix the weight of subsidiary coins so as to maintain the parity of such coins with the standard silver dollar and with the gold dollar."

Sec. 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed.

Sec. 14. (a) The Second Liberty Bond Act, as amended, is further amended as follows:

(1) By adding at the end of section 1 (U. S. C., title 31, sec. 752; Supp. VII, title 31, sec. 752), a new paragraph as follows:

"Notwithstanding the provisions of the foregoing paragraph, the Secretary of the Treasury may from time to time, when he deems it to be in the public interest, offer such bonds otherwise than as a popular loan and he may make allotments in full, or reject or reduce allotments upon any applications whether or not the offering was made as a popular loan."

(2) By inserting in section 8 (U. S. C., title 31, sec. 771), after the words "certificates of indebtedness", a comma and the words "Treasury bills."

(3) By striking out the figures "$7,500,000,000" where they appear in section 18 (U. S. C., title 31, sec. 753) and inserting in lieu thereof the figures "$10,000,000,000."

(4) By adding thereto two new sections, as follows:

"Sec. 19. Notwithstanding any other provisions of law, any obligations authorized by this Act may be issued for the purchase, redemption, or refunding, at or before maturity, of any outstanding bonds, notes, certificates of indebtedness, or Treasury bills, of the United States, or to obtain funds for such purchase, redemption, or refunding, under such rules, regulations, terms, and conditions as the Secretary of the Treasury may prescribe.

"Sec. 20. The Secretary of the Treasury may issue any obligations authorized by this Act and maturing not more than one year from the date of their issue on a discount [fol. 68] basis and payable at maturity without interest. Any such obligations may also be offered for sale on a competitive basis under such regulations and upon such

terms and conditions as the Secretary of the Treasury may prescribe, and the decisions of the Secretary in respect of any issue shall be final."

(b) Section 6 of the Victory Liberty Loan Act (U. S. C., title 31, sec. 767; Supp. VII, title 31, secs. 767-767a) is amended by striking out the words "for refunding purposes", together with the preceding comma, at the end of the first sentence of subsection (a).

(c) The Secretary of the Treasury is authorized to issue gold certificates in such form and in such denominations as he may determine, against any gold held by the Treasurer of the United States, except the gold fund held as a reserve for any United States notes and Treasury notes of 1890. The amount of gold certificates issued and outstanding shall at no time exceed the value, at the legal standard, of the gold so held against gold certificates.

Sec. 15. As used in this Act the term "United States" means the Government of the United States; the term "the continental United States" means the States of the United States, the District of Columbia, and the Territory of Alaska; the term "currency of the United States" means currency which is legal tender in the United States, and includes United States notes, Treasury notes of 1890, gold certificates, silver certificates, Federal Reserve notes, and circulating notes of Federal Reserve banks and national banking associations; and the term "person" means any individual, partnership, association, or corporation, including the Federal Reserve Board, Federal Reserve banks, and Federal Reserve agents. Wherever reference is made in this Act to equivalents as between dollars or currency of the United States and gold, one dollar or one dollar face amount of any currency of the United States equals such a number of grains of gold, nine tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight tenths grains of gold, nine tenths fine, and thereafter such a number of grains of gold, nine tenths fine, as the President shall have fixed under such authority.

Sec. 16. The right to alter, amend, or repeal this Act is hereby expressly reserved. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Sec. 17. All Acts and parts of Acts inconsistent with any of the provisions of this Act are hereby repealed.

Approved, January 30, 1934.

[fol. 69] Supplement

A. Amendments

Amendment to Provisional Regulations Issued under the Gold Reserve Act of 1934

Treasury Department,
Office of the Secretary,
March 8, 1934.

The Provisional Regulations issued on January 30, 1934, under the Gold Reserve Act of 1934, as amended on January 31, 1934, are further amended in sections 45 and 46 by deleting therefrom the phrase "March 15, 1934" wherever it appears and inserting in lieu thereof the phrase "May 1, 1934".

H. Morgenthau, Jr., Secretary of the Treasury.

Approved: (Signed) Franklin D. Roosevelt, The White House, March 8, 1934.

Amendment to Provisional Regulations Issued under the Gold Reserve Act of 1934

Treasury Department,
Office of the Secretary,
April 19, 1934.

The Provisional Regulations issued on January 30, 1934, under the Gold Reserve Act of 1934, as amended are further amended in sections 45 and 46 by deleting therefrom the word and figures "May 1, 1934" wherever they appear in said sections, as amended March 8, 1934, and

inserting in lieu thereof the word and figures "June 1, 1934".

(Signed) H. Morgenthau, Jr., Secretary of the Treasury.

Approved: (Signed) Franklin D. Roosevelt, The White House, April 20, 1934.

Amendment to Provisional Regulations Issued under the Gold Reserve Act of 1934

Treasury Department,
Office of the Secretary,
October 16, 1934.

The Provisional Regulations issued on January 30, 1934, under the Gold Reserve Act of 1934, as amended, are further amended in section 19 by deleting the last sentence thereof, and by adding the following paragraphs:

"Gold amalgam which results from the addition of mercury to gold in its natural state recovered from natural deposits in the United States or a place subject to the [fol. 70] jurisdiction thereof, may be heated to a temperature sufficient to separate the mercury from the gold (but not to the melting temperature of gold) without a license by the person who recovered the gold from such deposits, or his duly authorized agent or employee. The retort sponge resulting from such heating of such gold amalgam may be held and transported by such person without a license: Provided, however, That no such person may hold at any one time an amount of such retort sponge which exceeds in fine gold content 200 troy ounces. Such retort sponge may be acquired from such persons by the United States or by persons holding licenses on form TGL-13 or TGL-14, but by no other person.

"Except as provided in article II, and in section 33, gold in its natural state may be melted or treated or exported only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, article III."

(Signed) H. Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt. October 22, 1934.

B. General Rulings

General Ruling No. 1 under the Gold Reserve Act of 1934, and Regulations Issued Pursuant Thereto

Pursuant to the authority conferred upon me by section 8 of the Gold Reserve Act of 1934, and by section 35 (d) of the regulations issued thereunder as amended, I hereby authorize each and every United States mint and assay office, subject to the conditions in said regulations and in the general regulations governing the mints and subject to the conditions hereinbelow specified, to purchase at the purchase price prescribed under section 42 of the said regulations, as amended, or at such price as may hereafter be prescribed under authority of said section, gold which such mint or assay office is satisfied was refined (or is equivalent to gold refined) from gold-bearing materials imported into the United States, whether such importation occurred before, on, or after January 30, 1934, and whether such gold or gold-bearing materials have been in customs' custody throughout the period in which they have been within the customs' limits of the continental United States.

Before any such gold may be purchased under this ruling, the requirements of paragraph (1), (2), and (3) of section 32 of the regulations issued under the aforesaid act must be shown to have been complied with, and in addition the depositor shall have filed an affidavit in duplicate on form TG-26, together with two duly attested copies of the settlement sheet covering the gold-bearing materials imported: Provided, however, That any person hereafter importing gold-bearing materials and offering the gold extracted therefrom for sale to a mint or assay office other than the mint at San Francisco or the assay office at New York must have caused the copy of the entry described in paragraph (1) of said section 32 and the attested copy of the record described in paragraph (3) of said section 32, to be forwarded to the mint or assay office to which he is offering the aforesaid gold for sale instead of to the mint at San Francisco or the assay office at New York: and Provided further, That gold extracted from gold-bearing materials heretofore imported into the United States may be sold to any United States mint or assay office, but before [fol. 71] it is purchased by any other mint or assay office

than the one to which the copy of the entry described in paragraph (1) of said section 32 and the attested copy of the record described in paragraph (3) of said section 32 were sent, the depositor of such gold shall have caused the aforesaid copy of entry and attested copy of record to be forwarded by the mint or assay office in which they were first filed to the mint or assay office to which he proposes to sell such gold.

The declaration described in paragraph (1) of section 32, whether made before or after the promulgation of this ruling, shall be deemed to constitute a declaration of intention either of exporting the gold extracted (or the equivalent of the gold extracted) from the gold-bearing materials with respect to which such declaration was made, or of selling the same in accordance with this ruling.

No gold shall be accepted for purchase under authority of this ruling unless it is delivered to the mint and all of the terms of this ruling complied with within seven months from the date of the formal entry into the United States of the gold-bearing materials from which it was extracted.

H. Morgenthau, Jr., Secretary of the Treasury.

Dated February 20, 1934.

General Ruling No. 2 under the Gold Reserve Act of 1934, and Regulations Issued Pursuant Thereto

Pursuant to the authority conferred upon me by the Gold Reserve Act of 1934 and by section 35 (d) of the regulations issued thereunder, as amended, I hereby authorize each and every United States mint and assay office, subject to the conditions in said regulations, and in the general regulations governing the mints and assay offices, and subject to the conditions hereinbelow specified, to purchase at the purchase price prescribed under section 42 of said regulations, as amended, or at such price as may hereafter be prescribed under authority of said section, gold imported into the United States prior to January 31, 1934, which has been in customs' custody throughout the period in which it shall have been within the customs' limits of the continental United States.

No deposit of such gold shall be accepted unless accompanied by an affidavit properly executed in duplicate on form TG-23. Such gold may be purchased even though the

depositor has no license to acquire, hold, or import said gold.

H. Morgenthau, Jr., Secretary of the Treasury.

Dated March 2, 1934.

General Ruling No. 3 Issued under the Gold Reserve Act of 1934 and the Regulations Issued Pursuant Thereto

Pursuant to the authority conferred upon me by section 8 of the Gold Reserve Act of 1934, and by subdivision (d) of section 35 of the Provisional Regulations issued thereunder, as amended, I hereby authorize each and every United States mint and assay office, subject to the conditions in said regulations and in the general regulations governing the mints and subject to the conditions hereinbelow specified, to purchase at the purchase price prescribed in section 42 of said Provisional Regulations, as amended, [fol. 72] or at such price as may hereafter be prescribed under authority of said section, gold contained in deposits of silver which are receivable by the United States mints and assay offices under the proclamation of August 9, 1934, provided such mints and assay offices are satisfied—

(a) That the deposit of gold and silver does not contain more than 200 parts of gold in 1,000 by assay;

(b) That the gold has not been held at any time in noncompliance with the act of March 9, 1934, any Executive order or orders of the Secretary of the Treasury issued thereunder or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto, and has not been acquired or held, transported, melted, or treated, or held in custody in violation of the Gold Reserve Act of 1934 or any regulations or licenses issued thereunder; and

(c) That the gold was not mixed with such silver for the purpose of selling to the United States gold, which was not eligible for purchase by the United States under subdivisions (a), (b), or (c) of section 35 of the Provisional Regulations issued under the Gold Reserve Act of 1934 or under general rulings no. 1 or 2 issued under subdivision (d) of said section 35 of said regulations.

(Signed) Stephen B. Gibbons, Acting Secretary of the Treasury.

August 31, 1934.

General Ruling No. 4 Issued under the Gold Reserve Act of 1934 and the Regulations Issued Pursuant Thereto

Pursuant to the authority conferred upon me by section 8 of the Gold Reserve Act of 1934, and by subdivision (d) of section 35 of the Provisional Regulations issued thereunder, as amended, I hereby authorize each and every United States mint and assay office, subject to the conditions in said regulations and in the general regulations governing the mints and subject to the conditions hereinbelow specified, to purchase at the purchase price prescribed in section 42 of the Provisional Regulations, as amended, or at such price as may hereafter be prescribed under authority of said section, from any person regularly engaged in an industry, profession, or art in which gold is used, processed, or manufactured, gold filings, clippings, pieces, and the like which were not acquired by such person in such form, but which have accrued directly from, and as a result of, the legitimate, customary, and ordinary conduct of such person's industry, profession, or art.

The mints and assay offices shall not purchase any gold under this ruling unless the deposit of such gold is accompanied by a duly executed affidavit on form TG-27 and unless they are satisfied that the gold was acquired, held, melted and treated, and transported in accordance with a license issued pursuant to section 23 of the Provisional Regulations, or as permitted without a license under article II or section 21 of such regulations.

No mint or assay office shall purchase under this ruling any gold filings, clippings, pieces or the like from any person who has acquired such gold in such form from any other person.

(Signed) H. Morgenthau, Jr., Secretary of the Treasury.

November 26, 1934.

[fol. 73] General Ruling No. 5 Issued under the Gold Reserve Act of 1934 and the Regulations Issued Pursuant Thereto

Pursuant to the authority conferred upon me by section 8 of the Gold Reserve Act of 1934, and by subdivision (d) of section 35 of the Provisional Regulations issued thereunder, as amended, I hereby authorize each and every United

States mint and assay-office, subject to the conditions in said regulations and in the general regulations governing the mints and assay offices and subject to the conditions hereinafter specified, to purchase at the price prescribed in section 42 of the Provisional Regulations, as amended, or at such price as may hereinafter be prescribed in such section, gold refined from sweeps purchased, subsequent to the date of this ruling, from a United States mint or assay office.

The United States mints and assay offices shall not purchase any gold under this ruling unless the deposit of such gold is accompanied by a duly executed affidavit on form TG-28.

H. Morgenthau, Jr., Secretary of the Treasury.

December 31, 1934.

[fol. 74] Treasury Department, Office of the Secretary

October 16, 1934.

Amendment to Provisional Regulations

Issued under the Gold Reserve Act of 1934

The Provisional Regulations issued on January 30, 1934, under the Gold Reserve Act of 1934, as amended, are further amended in section 19 by deleting the last sentence thereof, and by adding the following paragraphs:

"Gold amalgam which results from the addition of mercury to gold in its natural state recovered from natural deposits in the United States or a place subject to the jurisdiction thereof, may be heated to a temperature sufficient to separate the mercury from the gold (but not to the melting temperature of gold) without a license by the person who recovered the gold from such deposits, or his duly authorized agent or employee. The retort sponge resulting from such heating of such gold amalgam may be held and transported by such person without a license: Provided, however, that no such person may hold at any one time an amount of such retort sponge which exceeds in fine gold content 200 troy ounces. Such retort sponge may be acquired from such persons by the United States or by persons holding licenses on form TGL-13 or TGL-14, but by no other person.

"Except as provided in article II, and in section 33, gold in its natural state may be melted or treated or exported only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, article III."

H. Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt. October 22, 1934.

[fol. 75] Treasury Department, Office of the Secretary

April 19, 1934.

Amendment to Provisional Regulations

Issued under the Gold Reserve Act of 1934

The provisional Regulations issued on January 30, 1934, under the Gold Reserve Act of 1934, as amended, are further amended in sections 45 and 46 by deleting therefrom the word and figures "May 1, 1934" wherever they appear in said sections, as amended March 8, 1934, and inserting in lieu thereof the word and figures "June 1, 1934".

H. Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt, The White House, April 20, 1934.

Treasury Department, Office of the Secretary

March 8, 1934.

Amendment to Provisional Regulations

Issued under the Gold Reserve Act of 1934

The Provisional Regulations issued on January 30, 1934 under the Gold Reserve Act of 1934, as amended on January 31, 1934, are further amended in Sections 45 and 46 by deleting therefrom the phrase "March 15, 1934" wherever it appears and inserting in lieu thereof the phrase "May 1, 1934".

H. Morgenthau, Jr., Secretary of the Treasury.

Approved: Franklin D. Roosevelt, The White House, March 8, 1934.

[fol. 76] DEBTOR'S EXHIBIT "A"

UNITED STATES OF AMERICA,
Treasury Department, Washington:

April 2, 1935.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed

Typewritten copy of telegram of Instructions of January 17, 1934, to all Federal Reserve banks,

Typewritten copy of part of telegram of February 1, 1934, to all Federal Reserve banks,

Typewritten copy of part of telegram of February 7, 1934, to all Federal Reserve banks,

are true copies of the initialed carbons on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld, Chief Clerk, Treasury Department.

B. B. (Seal.)

Telegram

Official Business—Government Rates

Washington, Jan. 17, 1934.

To Governors, Federal Reserve Banks.

Boston, Mass.	Chicago, Ill.
New York, N. Y.	St. Louis, Mo.
Philadelphia, Pa.	Minneapolis, Minn.
Cleveland, Ohio.	Kansas City, Mo.
Richmond, Va.	Dallas, Texas.
Atlanta, Ga.	San Francisco, Calif.

As fiscal agent of the United States you will kindly be governed by the following instructions which you are re- [fol. 77] quested to have printed and distributed in the same

manner as requested in my telegram of December 28 with respect to the Order of that date Colon Quote

(Instructions to telegrapher—Here take in attached instructions of the Secretary of the Treasury.)

Morgenthau.

Private Wire.

"The Order of the Secretary of the Treasury dated January 15, 1934, supplementing the Order of December 28, 1933, Requiring the Delivery of Gold Coin, Gold Bullion and Gold Certificates to the Treasurer of the United States provides, in part, as follows:

"* * * I, Henry Morgenthau, Jr., Secretary of the Treasury, do hereby fix midnight of Wednesday, January 17, 1934, as the expiration of the period within which any gold coin, gold bullion, or gold certificates may be paid and delivered to the Treasurer of the United States in compliance with the requirements contained in such Order of December 28, 1933, as amended.

'In the event that any gold coin, gold bullion or gold certificates withheld in noncompliance with said Order and of this Order are offered after January 17, 1934, to the Secretary of the Treasury, the Treasurer of the United States, any United States mint or assay office, or to any fiscal agent of the United States, there shall be paid therefor only such part or none of the amount otherwise payable therefor as the Secretary of the Treasury may from time to time prescribe and the whole or any balance shall be retained and applied to the penalty payable for failure to comply with the requirements of such Order and of this Order. The acceptance of any such coin, bullion, or certificates after January 17, 1934, whether or not a part or all of the amount otherwise payable therefor is so retained, shall be without prejudice to the right to collect by suit or otherwise the full penalty provided in Section 11 (n) of the Federal Reserve Act, as amended, less such portion of the penalty as may have been retained as hereinbefore provided.'

[fol. 78] Subject to the rights reserved in said Order of January 15, 1934, supplementing the Order of December 28, 1933, requiring the delivery of gold coin, gold bullion and gold certificates to the Treasurer of the United States, and without prejudice to the right to alter or amend these instructions from time to time by notice to the Treasurer of

the United States, the United States Mints and Assay Offices, and the Federal reserve banks, I do hereby prescribe that in the event that any gold coin, gold bullion or gold certificates held in noncompliance with said Order of December 28, 1933, as amended, and said Order of January 15, 1934, are offered after January 17, 1934, to the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office or to any fiscal agent of the United States, the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office, and the fiscal agents of the United States shall pay for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion $20.67 an ounce. Member banks of the Federal Reserve System may receive such gold coin, gold bullion and gold certificates for account of the Treasurer of the United States and forthwith forward the same to the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office or any fiscal agent of the United States, whichever is nearest.

H. Morgenthau, Jr., Secretary of the Treasury."

Telegram

Official Business—Government Rates

Washington, Feb. 1, 1934.

To Governors, Federal Reserve Banks.

Boston, Mass.	Chicago, Ill.
New York, N. Y.	St. Louis, Mo.
Philadelphia, Pa.	Minneapolis, Minn.
Cleveland, Ohio.	Kansas City, Mo.
Richmond, Va.	Dallas, Texas.
Atlanta, Ga.	San Francisco, Calif.

[fol. 79] Proclamation signed January 31, 1934, by President reducing gold content of dollar does not alter instructions as to amount to be paid or other instructions contained in my January seventeenth telegram relating to wrongfully withheld gold delivered after January seventeenth and my January nineteenth telegram relative to mutilated coin.

* * *

Morgenthau.

Private Wire.

Telegram

Official Business—Government Rates

Washington, Feb. 7, 1934.

To Governors, Federal Reserve Banks.

Boston, Mass.	Chicago, Ill.
New York, N. Y.	St. Louis, Mo.
Philadelphia, Pa.	Minneapolis, Minn.
Cleveland, Ohio.	Kansas City, Mo.
Richmond, Va.	Dallas, Texas.
Atlanta, Ga.	San Francisco, Calif.

Referring to my February one telegram concerning wrongfully withheld gold hereafter delivered Stop You are requested, if you have not already done so, to advise all banks in your district that the Proclamation signed January 31, 1934, by the President reducing the gold content of the dollar does not alter instructions as to the amount to be paid for wrongfully withheld gold coin, gold bullion and gold certificates hereafter delivered or other instructions contained in my January seventeen telegram and my January nineteen telegram relative to mutilated coin. * * *

Morgenthau.

Private Wire.

[fol. 80] DEBTOR'S EXHIBIT "B"

Application for License to Acquire and Hold, Transport, Melt and Treat, Import, and/or Hold for Domestic Account Gold for Use in Industry, Profession, or Art, or for Sale to the United States.

(To be executed and filed in duplicate with the United States Mint or Assay Office for the mint district in which the applicant's principal place of business is located.)

To the United States Mint or Assay Office at—:

In accordance with the Gold Reserve Act of 1934 and the Regulations issued thereunder, the undersigned hereby makes application to acquire from time to time and hold in

stock, transport, melt and treat, import, and/or hold for domestic account gold for legitimate and customary use in industry, profession, or art, or for sale to the United States as hereinafter set forth:

A. The name of the applicant is —— —— and applicant's principal place of business is located at (Street) (City) (State).

B. (1) The applicant has since (Date) been engaged in the business of furnishing scrap gold for industry, profession, or art, or for sale to the United States (State nature of applicant's business).

(2) The applicant has since (Date) been engaged in the business of furnishing gold (other than scrap gold) or processing gold for industry, profession, or art, or for sale to the United States (State nature of applicant's business).

(3) The applicant has since (Date) been engaged in an industry, profession, or art in which stocks of gold in excess of 25 fine troy ounces are required to be maintained by the applicant for direct use in such industry, profession, or art (State nature of applicant's business).

C. The applicant now holds or formerly held Treasury License TGL bearing Serial No. — issued by the United [fol. 81] States (Mint Assay Office) as — authorizing the acquisition and holding of — troy ounces of fine gold.

D. The applicant actually used for the legitimate and customary requirements of his business during the year preceding the date hereof — troy ounces of fine gold.

If the applicant has filled out B(1) and/or B(2) above, he should also state the industries, professions, and arts to which he furnished, or for which he processed, gold for legitimate and customary uses during the year preceding the date hereof (State general types of industries, professions, and arts, and not names of individual organizations).

E. In order to supply the legitimate and customary requirements of his business for a period of 3 months applicant needs to carry a stock of gold in the amount of — fine troy ounces.

F. The applicant shall state—

(1) If an individual

Whether or not any applications have been filed by or licenses issued to any partnership, association, or corporation in which the applicant has a substantial interest, and if the answer is in the affirmative, state the name and address of each such partnership, association, or corporation and the mints or assay offices where such applications were filed or licenses issued:

(2) If a partnership, association, or corporation

Whether or not any applications have been filed by or licenses issued to any person having a substantial interest in such partnership, association, or corporation, and if the answer is in the affirmative, state the name and address of each such person and the mint or assay office where such applications were filed or licenses issued:

The applicant agrees that if he receives a license under Article III of the Regulations issued pursuant to the Gold Reserve Act of 1934 and thereafter acquires a principal in- [fol. 82] terest in any partnership, association, or corporation holding a license under Article III of the Regulations issued pursuant to the Gold Reserve Act of 1934, he will immediately so inform the mints and assay offices which issued said licenses. The applicant, if a partnership, association, or corporation, agrees that if a license is issued to it under Article III of the Regulations issued pursuant to the Gold Reserve Act of 1934 and thereafter a person holding a license under said Article III acquires a principal interest in the applicant, it will immediately so inform the mints and assay offices, which issued said licenses.

G. The name under which the applicant is doing business is (State name under which applicant is doing business.)

The applicant agrees to notify immediately the mint or assay office which issued his license of any change in the name under which he is doing business.

(Words "he" and "his" will, in appropriate cases, be deemed to be "she", "hers", "it", and "its".)

The undersigned will use gold acquired under authority of the license herein applied for, only for sale to the United States, or for the legitimate and customary requirements of

the industry, profession, or art in which the applicant is engaged, or for furnishing or processing it for industry, profession, or art in full compliance with the Gold Reserve Act of 1934 and the Regulations and Rulings issued thereunder. The undersigned will keep exact records of all his acquisitions and deliveries of gold and the records shall contain the name, address, and license number of each person from whom the undersigned acquires, or to whom the undersigned delivers, gold (other than fabricated gold) and shall show: (1) the amount, date and description of each such acquisition and delivery; (2) the amount of gold disposed of by fabrication; (3) the source of the gold, if imported; and (4) the total amount of gold on hand (not including gold which has been fabricated) at the end of the quarterly period for which a report is made. The undersigned also agrees to keep such records for at least a year and to make such records available for examination by a representative of the Treasury Department at any time. The undersigned will [fol. 83] comply in all respects with the Gold Reserve Act of 1934 and the Regulations and Rulings issued thereunder. No other application of the undersigned for a license under the Gold Reserve Act of 1934 and the Regulations and Rulings issued thereunder, to acquire or hold, transport, melt, treat, import, and/or hold gold for domestic account is pending with any United States mint or assay office.

(Applicant:) —— ——, by —— ——.

STATE OF ——,
County of ——, ss:

I, ———, on oath depose and say that I am the applicant in the above application for license or the (State relationship of affiant to the applicant:) —— of (Name of applicant, if applicant is other than individual:) —— ——, which is the applicant in the above application for license; that I am duly authorized to make the foregoing application on behalf of the applicant; that I have personal knowledge of the facts as set forth in said application and know the same to be true; and that I do not have knowledge of any material facts in connection with such application which are not fully and accurately set forth therein.

(Signature of affiant:) —— ——, (Address:) ——.

Subscribed and sworn to before me this — day of ——, 193-, (Officer administering oath:) —— ——.
My commission expires —— —, ——.

NOTE.—No person shall make application for a license to more than one mint or assay office; and in the event that any one person is, through misrepresentation or mistake, issued a license under Article III of the Regulations issued under the Gold Reserve Act of 1934, by more than one mint or assay office, all licenses issued to such person shall be void from the date of issuance to such person of a license by a second mint or assay office.

Copies of this form may be obtained, on request, at any [fol. 84] United States mint or assay office, any Federal reserve bank, or the Treasury Department at Washington, D. C.

Form TG-19.

Treasury Department, Office of the Secretary

Affidavit Accompanying Deposits by Persons Who Have Recovered Gold by Mining or Panning.

STATE OF ——,
County of ——, ss:

I, (Name:) —— ——, of (Address) ——, being first duly sworn on oath depose and say that I am (Title of Officer executing affidavit:) —— of (Name and address of depositor:) —— ——, of the gold described below; that I have personal knowledge of all the facts concerning said gold as set forth in this affidavit.

(A) The name and address of the depositor is

(B) The description of the shipment of gold delivered is

(C) The net weight of this shipment in troy ounces is

(D) The assay or estimated fineness in parts per thousand is

(E) The content of fine gold in troy ounces is (estimate if necessary)

(F) The United States Mint or Assay Office to which shipped is

(G) The date shipped is

(H) The source of the gold is (State whether ore, tailing, or placer, etc.)

(I) The tons of ore or tailing, or cubic yard of gravel from which this shipment was recovered are

(J) The period in which the gold was taken from the mine or placer deposit is 193 , to 193

(K) The name and location of mine or placer deposit from which the gold was recovered is

(L) The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is 193

(M) The date such gold was converted into the form in which presented is 193

[fol. 85] The gold referred to herein was recovered by this depositor by mining or panning and no part thereof has been held by this depositor, "or to the best of my knowledge, information and belief, by any other person", at any time in noncompliance with the Act of Mar. 9, 1933, any Executive Order or Orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or licenses issued thereunder. No part of such gold has ever entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of the gold prescribed hereinunder and in accordance with the provisions of the Gold Reserve Act of 1934, and the regulations issued thereunder.

By ——

Subscribed and sworn to before me this — day of —— 193-. ——, (Officer administering oath). My Commission expires ——, ——.

Form TG-20.

Treasury Department, Office of the Secretary

Affidavit Accompanying Deposit by Persons Who Have Recovered Gold in the Regular Course of Their Business of Operating a Custom Mill, Smelter or Refinery

STATE OF ——,
County of ——, ss:

I, (Name:) ——, of (Address:) —— being first duly sworn on oath depose and say that I am (Title of officer executing affidavit:) ——, of (Name and address of Depositor) —— the depositor of the gold described below; that I have

personal knowledge of all the facts concerning said gold as set forth in this affidavit:

(A) The name and address of the depositor is

[fol. 86] (B) The description of the shipment of gold delivered is

(C) The net weight of this shipment in troy ounces is

(D) The Assay or estimate fineness in parts per thousand is

(E) The content of fine gold in troy ounces is (estimate if necessary)

Form TG-21

Treasury Department, Office of the Secretary

Affidavit Accompanying Deposits by Persons Purchasing Gold Directly by Miners or Panners

STATE OF ——,
County of ——, ss:

I, (Name:) —— ——, of (Address:) ——, being first duly sworn on oath depose and say that I am (Title of officer executing affidavit:) ——, of (Name and address of depositor:) —— ——, the depositor of the gold described below; and to the best of my knowledge, information, and belief all the facts concerning said gold as set forth in this affidavit are true:

A. The name and address of the depositor is
B. The description of the shipment of gold delivered is
C. The net weight of this shipment in troy ounces is
D. The assay or estimated fineness in parts per thousand is
E. The content of fine gold in troy ounces is (estimate if necessary)
F. The United States Mint or Assay Office to which shipped is
G. The date shipped is 193
H. The names and addresses of the persons from whom the gold was purchased (is) (are)—

1. (Name) (Address)
2. (Name) (Address)
3. (Name) (Address)

I. The amount and description of each lot purchased is—

1. (Amount purchased from person named in H(1), Date, Description

[fol. 87] 2. (Amount purchased from person named in H(2), Date, Description

3. (Amount purchased from person named in H(3), Date, Description

J. The location of the mine or placer deposit from which each lot was taken is—1. (As to the lot described in I(1)

2. (As to the lot described in I(2)

3. (As to the lot described in I(3)

K. The period in which the gold was taken from the mine or placer deposits referred to in item J is—

1. (As to the lot described in J(1) 193 , to 193
2. (As to the lot described in J(2) 193 , to 193
3. (As to the lot described in J(3) 193 , to 193

L. The depositor is the holder of Treasury License TGL bearing serial No.

All of said gold was purchased by this depositor or to the best of my knowledge, information and belief, by any other person directly from the persons who mined or panned such gold and no part thereof has been held by this depositor at any time in noncompliance with the Act of March 9, 1933, any Executive order or Orders of the Secretary of the Treasury issued thereunder or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto or in noncompliance with the Gold Reserve Act of 1934, or any regulations or licenses issued thereunder.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of the gold described herein under and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder. No part of such gold has ever entered into monetary or industrial use.

By —— ——.

Subscribed and sworn to before me this — day of —— 193–. —— —— (Officer administering oath).
My Commission expires —— —, ——.

[fol. 88] Form TG-22

Treasury Department, Office of the Secretary

Affidavit of Depositor of Unmelted Scrap Gold

STATE OF ——,
County of ——, ss:

I, (Name of Affiant:) —— ——, of (Address:) —— being first duly sworn on oath depose and say:

1. That I am the depositor of the gold described in item 4 below, or that I am the (State relationship of affiant to depositor:) ——, of (Name and address of depositor:) —— —— which is the depositor of the gold described in item 4 below;

2. That on —— —, 193 this depositor shipped — troy ounces of gold (net weight) to the United States (Mint Assay Office) at ——;

3. That the estimated gold content of such deposit is parts per thousand, and the estimated total fine gold content of such deposit is — troy ounces;

4. That the description of the contents of such deposit is

5. The gold contained in this deposit was acquired and transported by this depositor—

(a) under authority of license number — dated —— —, 193–, issued by the United States (Mint Assay Office) at (or)

(b) Without a license, but as permitted under sections — of the Regulations issued under the Gold Reserve Act of 1934.

6. That such deposit consists entirely of unmelted scrap gold within the meaning of that term as used in the Regulations issued pursuant to the Gold Reserve Act of 1934, and does not contain any gold coin, gold derived by any person from gold coin, melted scrap gold, melted gold of any description, or gold in any form other than unmelted scrap;

7. That no part of the gold contained in such deposit has been held by the depositor in noncompliance with the Act

[fol. 89] of March 9, 1933, any Executive Order, or Orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such Orders or licenses issued, pursuant thereto, and such gold has not been acquired or held, transported, melted or treated, imported, earmarked, or held in custody for foreign or domestic account by the depositor in violation of the Gold Reserve Act of 1934, or any regulations or licenses issued thereunder; and to the best of my knowledge, information, and belief, such gold has not been acquired or held, transported, melted or treated, imported or earmarked or held in custody for foreign or domestic account by any other person in violation of any of the aforementioned acts, orders, regulations, or licenses.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of the gold described herein, under and in accordance with the provisions of the Gold Reserve Act of 1934 and the Regulations issued thereunder.

(Signature of affiant:) —— ——.

Subscribed and sworn to before me this — day of ——, 193–. —— ——, (Officer administering oath). (Notarial Seal.) My Commission expires —— — ——.

Form TG-23

Treasury Department, Office of the Secretary

Affidavit of the Depositor of Gold (Other Than Fine Gold Bars) Imported Into the United States After January 30, 1934

STATE OF ——,
County of ——, ss:

I, (Name:) —— ——, of (Address:) —— being first duly sworn on oath depose and say that I am the depositor of the (Title of officer executing affidavit:) —— of (Name and address of depositor:) —— ——, the depositor [fol. 90] of the gold described below; that I have personal knowledge of all the facts concerning said gold as set forth in this affidavit:

A. The name and address of the depositor is

B. The description of the shipment of gold delivered is

C. The net weight of this shipment in troy ounces is

D. The assay or estimated fineness in parts per thousand is

E. The content of fine gold in troy ounces is

F. The United States Mint or Assay Office to which shipped is (Estimate if necessary)

G. The gold was shipped by (Name of foreign shipper) from the port of on the vessel

H. The date of arrival of gold in the United States was at the port of

I. Said gold has been in customs' custody throughout the period in which it has been situated within the customs' limit of the continental United States. Attach written statement of Collector of Customs or Deputy Collector of Customs in support of this statement.

This gold was imported into the United States Subsequent to January 30, 1934 and no part thereof has been held by this depositor, or to the best of my knowledge, information and belief, by any other person, at any time in noncompliance with the Act of March 9, 1933, any Executive Order or Orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any Regulations prescribed under such orders or licenses issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any Regulations or licenses issued thereunder. No part of the above-described gold consists of fine gold bars, carrying a recognized stamp establishing a fineness of .899 or finer.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of the gold described herein under and in accordance with the provisions of the Gold Reserve Act of 1934 and the Regulations issued thereunder.

By —— ——.

[fol. 91] Subscribed and sworn to before me this —— day of —— 1934. —— ——, (Officer administering oath). My Commission expires —— —, ——.

Form TG-24

Treasury Department

Application and Affidavit of Purchaser of Gold from Mint or Assay Office for Use in Industry, Profession or Art.

(To be executed and filed in duplicate with Mint or Assay Office. Purchases may be made only from Mint or Assay Office issuing applicants license.)

To the United States (Mint Assay Office) at —:

The undersigned Name of applicant: —— ——, of Address ——, (hereinafter called the applicant) hereby offers to purchase — troy ounces of fine gold and agrees to pay for the same at the rate of thirty-five ($35.00) dollars (plus ¼ of 1% thereof) per troy ounce of fine gold. This offer is made under the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder and as an inducement to such sale the applicant avers as follows:

1. The applicant is the holder of Treasury License TGL— bearing serial number — issued by the United States Assay Office at New York, authorizing the acquisition and holding of — troy ounces of fine gold for use in industry, profession or art.

2. The applicant is the owner and holder of a stock of — troy ounces of fine gold (exclusive of any fabricated gold).

3. The amount of fine gold as near as the applicant can estimate which will be required by him (it) for legitimate and customary use in his (or its) business for a period of three months from the date hereof is — troy ounces.

4. The applicant during the year preceding the date hereof used approximately — troy ounces of fine gold in the legitimate and customary operation of the industry, profesession, or art in which he (or it) is regularly engaged.

5. Any gold which the applicant holds in stock or purchases from the United States Mint or Assay Office will be [fol. 92] used exclusively by him (it) in the industry, profession, or art in which he (it) is regularly engaged.

6. The applicant has complied with the regulations issued under the Gold Reserve Act of 1934 and with the terms of his (its) license.

(Signed) —— ——, by —— ——.

STATE OF ——,
County of ——, ss:

I, —— ——, on oath depose and say that I am the applicant in the above application for license or the — of — which is the applicant in the above application for license; that I am duly authorized to make the foregoing application on behalf of the applicant; that I have personal knowledge of the facts as set forth in said application and know the same to be true; and that I do not have knowledge of any material facts in connection with such application which are not fully and accurately set forth therein.

(Signature of affiant:) —— —— (address:) ——.

Subscribed and sworn to before me this — day of —— 1934. —— —— (Officer administering oath).
My Commission expires —— — ——.

NOTE.—Under Article 7, Section 43 of the regulations issued pursuant to the Gold Reserve Act of 1934, United States Mints and Assay Offices are authorized to refuse to sell gold in amounts less than twenty-five ounces. Mints and Assay Offices are authorized to sell gold only to persons licensed by the selling Mint or Assay Office to acquire such gold for use in industry, profession, or art.

———

[fol. 93] IN UNITED STATES DISTRICT COURT

PETITIONER'S MOTION FOR FINDING FOR THE PETITIONER—
Received April 10, 1935; Denied July 2, 1935

Now comes the Holyoke Water Power Company, the above-named petitioner, and moves that on the law and the evidence the court make a finding for the petitioner.

Holyoke Water Power Company, by Warren, Garfield, Whiteside & Lamson, Avery, Healy, Gaylord & Button, Attorneys.

July 2, 1935. Motion denied. E. H. B., D. J.

In United States District Court

Debtor's Motion for Denial of Petition of Holyoke Water Power Company — Received April 10, 1935; Granted July 2, 1935

The American Writing Paper Company, Incorporated, the above-named debtor, hereby moves at the conclusion of the evidence on the petition of the Holyoke Water Power Company filed herein on January 18, 1935, that said petition be denied and dismissed.

By its Attorneys, Claude R. Branch, Charles P. Curtis, Jr.

July 2, 1935. Motion granted. E. H. B., D. J.

In United States District Court

Petitioner's Requests for Rulings of Law—Received April 10, 1935

1. The contracts in suit permit the debtor to satisfy them

(a) in a quantity of gold equal in amount to the gold coin specified in the respective contracts, or

(b) the equivalent of this commodity in United States currency.

2. The words "a quantity of gold equal in amount to $— of the gold coin of the United States" * * * as used in [fol. 94] the contracts in suit, mean a quantity of gold bullion equal to the amount of the gold bullion contained in such coin, and do not constitute a contract for the payment of money, but are a contract for the payment of gold bullion as a commodity.

3. The words "the equivalent of this commodity in United States currency" as used in the contracts in suit, mean the equivalent in value of the gold bullion, referred to in the contracts, in United States currency.

4. The equivalents in currency of the quantities of gold payable at the option of the debtor, under the indentures in question, are to be measured by the following rule: $1

face amount of currency equals such a number of grains of gold, nine-tenths fine, as were, on the respective dates, contained in the standard unit of value; that is, fifteen and five twenty-firsts grains of gold, nine-tenths fine or 13-15/21 grains of gold, one thousand fine.

5. During the years referred to in the contracts in suit as determining the amount required to satisfy them, the gold coin of the United States was fixed by law at nine-tenths fine, consisting of nine-tenths pure gold and one-tenth alloy.

6. The contracts in suit required satisfaction thereof either in gold as a commodity or in the value of that gold in United States currency.

7. It is not a defence to the cause of action that gold was not obtainable by the debtor in the United States if such be found to be the fact.

8. What the petitioner would have received for the commodity in suit had the defendant delivered it is not material.

9. The measure of damages is based upon what the petitioner would have to pay at the nearest available free and open market for the commodity in suit.

10. The amount of United States currency which the defendant was obligated to pay under its adoption of the second alternative referred to in the contracts in suit is based upon what it would cost the petitioner to obtain the commodity referred to in the first alternative in said con- [fol. 95] tracts in the nearest available open and free market with proper adjustment for shipping charges and insurance.

11. If there was no free market for gold in the United States on July 1, 1934, October 1, 1934, and January 1, 1935, or if the debtor was unable to obtain gold in the United States to satisfy the first alternative in the contract, performance of the first alternative was not impossible, since there was nothing in the contract or in the law to prevent the debtor from obtaining such gold in the free market of London and delivering the same in that city to the petitioner or to its order, nor was there anything in the contract or in the law to prevent the debtor from

making such delivery at the nearest accessible point to Holyoke in which no restrictions existed against such delivery and acceptance, and consequently, if the debtor chose the second alternative, the equivalent amount of currency payable would be the value of the gold had the debtor acquired it in the free London market.

12. It is not a defence to the cause of action that gold could not be disposed of by the petitioner in the United States, if such be found to be the fact, except to the United States or its agencies upon its own terms.

13. The petitioner's damages are to be measured by the value of gold in Holyoke, Massachusetts, where and on July 1, 1934, October 1, 1934, and January 1, 1935, when the rental was payable.

14. The amount of United States currency which the debtor was obligated to pay under its adoption of the second alternative referred to in the contracts in suit is based upon what the United States would pay, on the days designated by the contracts in suit for payment, for the commodity referred to in the first alternative in said contracts, with proper adjustment for shipping charges and insurance.

15. The amount of United States currency which the debtor was obligated to pay if it was unable to obtain and/or to deliver the commodity referred to in the respective contracts in suit is based upon what the United States on the days designated for payment would pay for the quantities of such commodity referred to in the respective contracts, with proper adjustment for shipping charges and insurance.

[fol. 96] 16. Since January 31, 1934, the price which the United States will pay for gold has at all times been fixed by Treasury Regulations issued on that date under the Gold Reserve Act of 1934 at $35 (less one-quarter of one percent) per troy ounce of fine gold and less all mint charges.

17. If the court finds that the only market price for gold was the price obtainable from the United States on July 1, 1934, October 1, 1934, and January 1, 1935, then the petitioner was entitled to receive in currency at Holyoke, Massachusetts, on July 1, 1934, the sum of $37,409.23; on

October 1, 1934, the sum of $507.13; on January 1, 1935, the sum of $33,516.61.

18. If the court finds that the only market price for gold was the price obtainable from the United States on July 1, 1934, October 1, 1934, and January 1, 1935, then the petitioner was entitled to receive the sum of $35, less one-quarter of one percent, for each ounce of gold contained in the gold coins specified in the respective contracts, with proper adjustments for mint charges, shipping charges and insurance.

19. Public Resolution No. 10 of the 73rd Congress as approved by the President on June 5, 1933, has no application to the case at bar.

20. The provision contained in the Joint Resolution of Congress of June 5, 1933, that "Every obligation * * * whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.", does not apply to the contracts in question.

21. The contract of the American Writing Paper Company, Incorporated, to pay "a quantity of gold equal in amount to $1500 of the gold coin of the United States of the standard of weight and fineness of the year 1894", is not by its very terms susceptible of being discharged "dollar for dollar" in any coin or currency.

22. If Public Resolution No. 10 of the 73rd Congress has any application to the case at bar, then the term "obligation", as used therein, refers to the obligation of the debtor, as it has elected to pay in currency, to pay such amount [fol. 97] of currency as is equivalent to the market value of the commodity referred to in the first alternative of the contracts in suit.

23. If Public Resolution No. 10 of the 73rd Congress requires the petitioner to receive in satisfaction of the contracts in suit an amount of legal tender in United States currency equal, dollar for dollar, to the number of gold dollars referred to in said contracts, then said Public Resolution is unconstitutional and void and especially contrary to the Fifth Amendment to the Constitution of the United States.

24. Public Resolution No. 10 of the 73rd Congress if held applicable to the case at bar is beyond the powers delegated to the United States and is unconstitutional and void and especially contrary to the Tenth Amendment to the Constitution of the United States.

25. If Public Resolution No. 10 of the 73rd Congress affects the contracts in suit, it is unconstitutional and void and especially contrary to the Fifth and Tenth Amendments to the Constitution of the United States.

Respectfully submitted, Warren, Garfield, Whiteside & Lamson, Avery, Healy, Gaylord & Button, Attorneys for the Petitioner.

BREWSTER, J.:

Petitioner's requests numbers 1, 2, 3, 5, 6, 7, 13, 19, 20 and 21 are granted. Requests numbers 4, 8 to 12, both inclusive, and 17 and 18 are denied. Requests numbers 14, 15 and 16 are denied so far as inconsistent with my opinion.

IN UNITED STATES DISTRICT COURT

DEBTOR'S REQUESTS FOR RULINGS AND FINDINGS—Received April 10, 1935

The debtor hereby requests that the court make the following findings and rulings:

1. That the Joint Resolution of Congress of June 5, 1933, required the debtor to discharge its obligations under the indentures mentioned in the petition by payment dollar for dollar of the amounts mentioned therein.

[fol. 98] 2. That the total amount due under the several indentures mentioned in the petition on July 1, 1934, was $22,279.31.

3. That the total amount due under the several indentures mentioned in the petition on October 1, 1934, was $299.25.

4. That the total amount due under the several indentures mentioned in the petition on July 1, 1934, was $19,979.93.

5. That the gold called for by the several indentures mentioned in the petition was gold of a fineness of nine-tenths.

6. That on July 1, 1934, and likewise on July 2, 1934, it was legally impossible for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

7. That on October 1, 1934, it was legally impossible for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

8. That on January 1, 1935, and likewise on January 2, 1935, it was legally impossible for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

9. That on July 1, 1934, and likewise on July 2, 1934, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

10. That on October 1, 1934, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

11. That on January 1, 1935, and likewise on January 2, 1935, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

12. That payment of the rentals under the indentures mentioned in the petition in gold was legally impossible on July 1, 1934, October 1, 1934, or January 1, 1935.

13. That payment of the rentals under the indentures mentioned in the petition in gold was impossible in fact on July 1, 1934, October 1, 1934, or January 1, 1935.

[fol. 99] 14. That it was legally impossible on July 1, 1934, October 1, 1934, or January 1, 1935, for the debtor to pay the petitioner a quantity of gold equal in amount to the number of dollars mentioned in the said indentures of the gold coin of the United States of the standard of weight and fineness of the years mentioned in the said indentures.

15. That it was impossible in fact on July 1, 1934, October 1, 1934, or January 1, 1935, for the debtor to pay the petitioner a quantity of gold equal in amount to the number of

dollars mentioned in the said indentures of the gold coin of the United States of the standard of weight and fineness of the years mentioned in the said indentures.

16. That the equivalent of the quantity of gold payable as rentals under the several indentures mentioned in the petition in United States currency is the amount of United States currency which the petitioner could have legally obtained for the said quantity of gold if the same had been paid to it on the respective dates on which the instalments of rental were due under the indentures.

17. That the equivalent of the quantity of gold payable as rentals under the several indentures mentioned in the petition in United States currency is the amount of money which the said quantity of gold would be worth to the petitioner for the purposes for which it could legally be used on the respective dates on which the instalments of rental were due under the indentures.

18. That the equivalent in currency of the quantity of gold called for by the several indentures mentioned in the petition on July 1, 1934, October 1, 1934, and January 1, 1935, was at the rate of $20.67 per ounce.

By its Attorneys.

Claude R. Branch. Charles P. Curtis, Jr. Russell C. Davenport.

BREWSTER, J.:

Request number 1 is denied. I do not rule on 13 and 15 as they are immaterial in view of my opinion. The remaining requests are granted.

[fol. 100] IN UNITED STATES DISTRICT COURT

FINAL DECREE—July 27, 1935

July 27, 1935. E. H. B., D. J.

This case came on to be heard at this sitting on the petition of the Holyoke Water Power Company, to establish the amount of rentals due under certain indentures for the lease of mill powers, and was argued by counsel, and there-

upon, to wit, on July 27, 1935, upon consideration thereof, it is

Ordered, adjudged and decreed that the claim of the petitioner be and the same hereby is established against this debtor for an amount obtained by multiplying the number of ounces of pure gold, namely, 2015.13567 by $20.67 per ounce. It appearing from stipulation filed in this case that the petitioner has already received this amount, it is further

Ordered, adjudged and decreed that the petitioner's petition be and the same hereby is denied and dismissed.

Witness the Honorable Elisha H. Brewster, Judge of said court, and the seal thereof, at Boston in said District, this twenty-seventh day of July, A. D. 1935.

Mary E. Prendergast, Deputy Clerk. (Seal.)

Assented to in form only. Choate, Hall & Stewart, Attorneys for Debtor.

CLAIM OF APPEAL AND ALLOWANCE THEREOF

From the foregoing final decree, the Holyoke Water Power Company claims an appeal, on August 24, 1935, to the United States Circuit Court of Appeals for the First Circuit, which appeal was allowed by the court on the same day.

[fol. 101] IN UNITED STATES DISTRICT COURT

OPINION—July 2, 1935

BREWSTER, J.:

In the above-entitled matter the Holyoke Water Power Company (hereinafter referred to as petitioner) has intervened as a creditor, in order to establish the amount of rentals due under certain indentures for the lease of mill powers. The rentals involved are those falling due July 1 and October 1, 1934, and January 1, 1935. The clause providing for the payment of semi-annual rentals, common to all of them, is as follows:

"A quantity of gold which shall be equal in amount to $— of the gold coin of the United States of the standard of

the weight and fineness of the year ——, or the equivalent of this commodity in United States currency."

The different years given in the several clauses fell within the period from 1881 to 1894, during all of which time the standard weight and fineness of the gold coin of the United States was 25.8 grains of nine-tenths fine for each dollar.

The net quantities of gold to which the petitioner would have been entitled under all of the indentures and its equivalent, according to its claim, are as follows:

July 1, 1934, 1055.978 troy ounces pure (1173.30875 9/10ths fine)	$36,959.23
Oct. 1, 1934, 14.39728 troy ounces pure (16.0992 9/10ths fine)	507.13
Jan. 1, 1935, 9447.6039 troy ounces pure (1049.73374 9/10ths fine)	33,066.61

In the case of the Holyoke Water Power Co. v. American Writing Paper Co., Inc., 9 F. Supp. 451, in a carefully considered opinion, Judge McLellan held, with respect to the debtor's obligation under these identical leases, for the rent accruing January 1, 1934, that the clauses constituted commodity contracts, as distinguished from money contracts, and that, therefore, as pre-existing contracts they did not come within the purview of the joint resolution of Congress of June 5, 1933, which provided that—

[fol. 102] "Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

In that case the debtor requested the court to rule that its obligations could be discharged by payment, dollar for dollar, of the amounts mentioned in the indentures. This ruling was denied, the court stating:

"The indentures contain no covenant to pay any definite sum of money. The number of dollars mentioned was the means of determining the amount of gold to be delivered or the amount of gold the equivalent whereof was to be paid in currency. The result which the defendant seeks cannot be

reached in this way, without doing violence to the intention of the parties as expressed in their contracts."

Judge McLellan further held that the obligation to pay in gold had become impossible of performance and that there remained only the obligation to pay the equivalent of this commodity (gold) in currency. Upon the evidence before him, he concluded that the equivalent in currency would be the number of ounces of gold, called for by the respective indentures, multiplied by $20.67 per ounce, the price which the United States Treasury was then paying in legal tender currency for the gold surrendered in accordance with the Act of March 9, 1933 (12 U. S. C. A. 248), and the orders of the Secretary of the Treasury issued pursuant to said Act on December 28, 1933.

Inasmuch as the same indentures and the same parties were before the court in the earlier proceeding, I feel bound by the rulings of the learned judge, so far as applicable to the facts before me,

Wakelee v. Davis, 44 F. 532;
Shreve v. Cheesman, 69 F. 785;
Commercial Union of America, Inc. v. Anglo-South American Bank, Ltd., 10 F. (2d) 937;

[fol. 103] unless they cannot stand in the light of the recent decisions of the Supreme Court in the so-called Gold Cases.

If Judge McLellan's views are to prevail, the only question presented in the instant petition is whether they are applicable to the situation which has developed since January 1, 1934. It becomes necessary, therefore, at the outset to determine whether the ruling of Judge McLellan, denying to the lessee the right to discharge its obligation dollar for dollar in any currency which, at the time of the payment, was legal tender for public or private debts, is compatible with the decision of the Supreme Court in Norman v. B. & O. Railroad Co., 294 U. S. 240.

The debtor relies upon dictum appearing in the opinion of the Chief Justice in the following language:

"But, if the clauses are treated as 'gold value' clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition."

I am unable to agree with the debtor's counsel that this language is inconsistent with the conclusion reached by Judge McLellan. It is clearly manifested all through the opinion that the court is dealing with money contracts and not commodity contracts. The Chief Justice observes:

"We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of $1000."

It is significant that in the language relied upon by the debtor the Chief Justice was referring to clauses intended to set up a measure or standard of value if gold coin was not available.

It is evident, from debates in the Senate upon the joint resolution of June 5, 1933, that Congress was attempting to steer clear of constitutional difficulties by limiting the repudiation of gold clauses in public and private contracts to those calling for payment of gold as currency, and not as a commodity. The definition of the word "obligation", as [fol. 104] used in the resolution, is expressly confined to "obligations payable in money of the United States". Debtor's obligations to pay a quantity of gold does not fall within the definition. The debtor contends that, since the obligation to pay gold has become impossible of performance, and the alternative is to pay its equivalent in United States currency, it comes within the definition. This contention cannot prevail over Judge McLellan's ruling to the contrary.

Notwithstanding subsequent events, to be considered later, I still hold, with Judge McLellan, that the debtor's obligation to pay rentals in gold is impossible of performance. The contracts were to be performed in Holyoke, and the debtor was under no obligation either to perform the contract in London or any other foreign market or to import the gold for the purpose of selling it to the United States mints and turning the proceeds over to the petitioner.

The court is now confronted, therefore, with the necessity of determining what amount, in available United States currency, would constitute the equivalent of the ounces of gold which the debtor undertook to pay by way of rental.

Two conflicting views are advanced by the parties. The petitioner argues that legislation enacted and regulations promulgated subsequent to January 21, 1934, have given rise to a situation which has enabled it to establish a market price for gold as a commodity considerably in excess of $20.67 an ounce.

The debtor, on the other hand, urges that the decisions of the Supreme Court in the cases of Nortz v. United States, 294 U. S. 317, and Perry v. United States, 294 U. S. 330, are controlling and admit of no conclusion other than that the price paid for gold surrendered under the orders of the Secretary of the Treasury still must prevail.

With respect to the petitioner's contention the following facts have appeared:

(1) That on January 15, 1934, the Secretary of the Treasury fixed January 17, 1934, as the expiration of the period within which gold might be delivered in compliance with the order of the Secretary of the Treasury of December 28, 1933, as amended. The Treasurer of the United States, the mints, any fiscal agent of the United States were instructed [fol. 105] to pay, after January 17, 1934, $20.67 an ounce for gold held in noncompliance with said order, but with the reservation that, in the event that any gold coin, gold bullion or gold certificates were held in noncompliance with the order and offered after January 17, 1934, "there shall be paid therefor only such part or none of the amount otherwise payable therefor as the Secretary of the Treasury may from time to time prescribe and the whole or any balance shall be retained and applied to the penalty payable for failure to comply with the requirements" of said order.

After the proclamation of the President reducing the gold content of the dollar, the instructions to pay $20.67 for gold coin, gold bullion or gold certificates, held in noncompliance with the order of the Secretary of the Treasury, continued in full force, notwithstanding devaluation, and, so far as appears, the instructions obtained on the rent days involved in this proceeding.

(2) On January 30, 1934, the Gold Reserve Act of 1934 was signed. This Act inter alia authorized the Secretary of the Treasury to purchase gold in any amounts, at home or abroad, as he might deem advantageous to the public interest and authorized the Secretary to issue rules and regula-

tions necessary and proper to carry out the purposes of this Act.

(3) On January 30 and 31, 1934, the Secretary of the Treasury issued Provisional Regulations under the Gold Reserve Act of 1934. Article VI of the Regulations related to the purchase of gold by mints, and Article VII to the sale of such gold. Under section 35 the mints were authorized to purchase (a) gold recovered from natural deposits in the United States; (b) unmelted scrap gold; (c) gold imported into the United States after January 30, 1934; and (d) such other gold as may be authorized from time to time by rulings of the Secretary of the Treasury. This section contained the following proviso:

"Provided, however, That no gold shall be purchased by any mint or assay office under the provisions of this article which, in the opinion of the mint, has been held at any time in noncompliance with the act of March 9, 1933, any Executive orders or orders of the Secretary of the Treasury issued [fol. 106] thereunder, or in noncompliance with any regulations prescribed under such orders or licenses issued pursuant thereto or which, in the opinion of the mint, has been acquired and held, transported, melted or treated or held in custody in violation of the Act or of regulations issued thereunder, including these regulations."

By section 40 the mints were authorized to purchase only such gold imported into the United States as had been in Customs custody throughout the period in which it shall have been situated within the Customs limits of the continental United States, and then only subject to certain specified provisions regarding entry and declaration to the Collector of Customs.

Section 42 of the Regulations fixed the purchase price at $35 (less ¼ of 1 percent) per troy ounce of fine gold. And section 43 authorized the mints to sell gold to persons licensed to acquire the same at the price of $35 (plus ¼ of 1 percent) per troy ounce of fine gold.

It is said that the reports issued by the Treasury Department at Washington show that since these regulations had become effective over 99 percent of the gold purchases by the Department has been made under the provisions of these regulations.

(4) On January 31, 1934, the President issued his proclamation reducing the gold content of the dollar from 25.8 grains of gold 9/10ths fine to 15 5/21sts grains of gold 9/10ths fine.

(5) There was admitted, over the objections of the petitioner, evidence that in the London market gold was sold at $35 per troy ounce.

Apparently Judge McLellan attached little importance to the reservation contained in the order of January 15, 1934, since he accepted as relevant evidence of market price the price obtainable from the government on January 17, 1934, when the price was expressly determined by executive order to be $20.67 an ounce.

If debtor's liability for rent is to be measured by the price at which certain kinds of gold are bought and sold by the United States mint, it could well be found that $35 per troy ounce was the fair market price for such gold, and in this view the price prevailing in the London market might have remote relevancy; otherwise, it could not be regarded as material.

[fol. 107] The difficulty with such a criterion is that the market for the gold purchased by the mints is closed to the petitioner. If it should receive, at Holyoke, the requisite quantity of gold called for by the indentures, it could obtain for it no more than $20.67 per troy ounce of pure gold, whether coin or bullion.

Nortz v. United States, supra;
Perry v. United States, supra.

While it is true that in the Nortz case the contract involved was for the payment of gold coin, it was nevertheless conceded that Congress had the power "to appropriate unto the government outstanding gold bullion, gold coin and gold certificates". This is precisely what was done by the Act of March 9, 1933, and the order of the Secretary of the Treasury of December 28, 1933. Any gold bullion received on account of rentals falling due in July or October, 1934, or January, 1935, would be held by the petitioner in noncompliance with the orders, and the only opportunity open to it would be to surrender it and to receive $20.67 per ounce. In no market could it obtain a better price. In Nortz v. United States, supra, the court observed:

"The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury. Plaintiff does not bring himself within any of the stated exceptions."

This language would be equally applicable to gold bullion, had that been paid to Nortz. It is pertinent to the situation presented in the instant case.

To accept the petitioner's theory is to confer upon it benefits which it could not have received had the gold been delivered in accordance with the provisions of the indentures. I am of the opinion that the legislation and regulations issued [fol. 108] thereunder do not warrant a conclusion different from that of Judge McLellan in the earlier case.

Claim, therefore, may be established against this debtor for an amount obtained by multiplying the number of ounces of pure gold by $20.67 per ounce.

I sympathize with the debtor's argument that it would make for convenience and certainty if the contracts were brought within the purview of the joint resolution so that the liability could be discharged dollar for dollar, but the rights of parties, of course, cannot be determined on considerations of expediency, or convenience.

IN UNITED STATES DISTRICT COURT

PETITIONER'S ASSIGNMENT OF ERRORS—Filed August 24, 1935

The petitioner, Holyoke Water Power Company, respectfully specifies the following assignment of errors with respect to the proceedings had in the above-entitled cause and the decree entered therein on July 27, 1935:

1. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 4 that the equivalents in currency of the quantities of gold payable

at the option of the debtor, under the indentures in question, are to be measured by the following rule: $1 face amount of currency equals such a number of grains of gold, nine-tenths fine, as were, on the respective dates, contained in the standard unit of value; that is, fifteen and five twenty-firsts grains of gold, nine-tenths fine or 13-15/21 grains of gold, one thousand fine.

2. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 8 that what the petitioner would have received for the commodity in suit had the defendant delivered it is not material.

3. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 9 that the measure of damages is based upon what the petitioner would have to pay at the nearest available free and open market for the commodity in suit.

4. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 10 that the [fol. 109] amount of United States currency which the defendant was obligated to pay under its adoption of the second alternative referred to in the contracts in suit is based upon what it would cost the petitioner to obtain the commodity referred to in the first alternative in said contracts is the nearest available open and free market with proper adjustment for shipping charges and insurance.

5. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 11 that if there was no free market for gold in the United States on July 1, 1934, October 1, 1934 and January 1, 1935, or if the debtor was unable to obtain gold in the United States to satisfy the first alternative in the contract, performance of the first alternative was not impossible, since there was nothing in the contract or in the law to prevent the debtor from obtaining such gold in the free market of London and delivering the same in that city to the petitioner or to its order, nor was there anything in the contract or in the law to prevent the debtor from making such delivery at the nearest accessible point to Holyoke in which no restrictions existed against such delivery and acceptance, and consequently, if the debtor chose the second alternative, the equivalent amount of currency payable would be the value of the gold had the debtor acquired it in the free London market.

6. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 12 that it is not a defense to the cause of action that gold could not be disposed of by the petitioner in the United States, if such be found to be the fact, except to the United States or its agencies upon its own terms.

7. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 17 that if the court finds that the only market price for gold was the price obtainable from the United States on July 1, 1934, October 1, 1934 and January 1, 1935, then the petitioner was entitled to receive in currency at Holyoke, Massachusetts, on July 1, 1934, the sum of $37,409.23, on October 1, 1934 the sum of $507.13, on January 1, 1935 the sum of $33,516.61.

7A. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 17 that [fol. 110] if the court finds that the only market price for gold was the price obtainable from the United States on October 1, 1934, then the petitioner was entitled to receive in currency at Holyoke on October 1, 1934, the sum of $507.13.

8. That the court erred in refusing to rule as requested by the petitioner in its request for rulings numbered 18 that if the court finds that the only market price for gold was the price obtainable from the United States on July 1, 1934, October 1, 1934 and January 1, 1935, then the petitioner was entitled to receive the sum of $35, less one-quarter of one percent, for each ounce of gold contained in the gold coins specified in the respective contracts, with proper adjustments for mint charges, shipping charges and insurance.

9. That the court erred in refusing to rule without qualification as requested by the petitioner in its request for rulings numbered 14 that the amount of United States currency which the debtor was obligated to pay under its adoption of the second alternative referred to in the contracts in suit is based upon what the United States would pay, on the days designated by the contracts in suit for payment, for the commodity referred to in the first alternative in said contracts, with proper adjustment for shipping charges and insurance.

10. That the court erred in refusing to rule without qualification as requested by the petitioner in its request for rul-

ings numbered 15 that the amount of United States currency which the debtor was obligated to pay if it was unable to obtain and/or to deliver the commodity referred to in the respective contracts in suit is based upon what the United States on the days designated for payment would pay for the quantities of such commodity referred to in the respective contracts, with proper adjustment for shipping charges and insurance.

11. That the court erred in refusing to rule without qualification as requested by the petitioner in its request for rulings numbered 16 that since January 31, 1934, the price which the United States will pay for gold has at all times been fixed by treasury regulations issued on that date under the Gold Reserve Act of 1934 at $35 (less one-quarter of one percent) per troy ounce of fine gold and less all mint charges.

[fol. 111] 12. The court erred in ruling that the total amount due under the several indentures mentioned in the petition on July 1, 1934, was $22,279.31.

13. The court erred in ruling that the total amount due under the several indentures mentioned in the petition on October 1, 1934, was $299.25.

14. The court erred in ruling that the total amount due under the several indentures mentioned in the petition on July 1, 1934, was $19,979.93.

15. The court erred in ruling that the gold called for by the several indentures mentioned in the petition was gold of a fineness of nine-tenths.

16. The court erred in ruling that on July 1, 1934 and likewise on July 2, 1934, it was legally impossible for either the debtor of the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

17. The court erred in ruling that on October 1, 1934, it was legally impossible for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

18. The court erred in ruling that on January 1, 1935 and likewise on January 2, 1935, it was legally impossible for either the debtor or the petitioner either to acquire or to

hold gold for the purpose of discharging the obligations under the said indentures.

19. The court erred in ruling that on July 1, 1934 and likewise on July 2, 1934, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

20. The court erred in ruling that on October 1, 1934, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

21. The court erred in ruling that on January 1, 1935 and likewise on January 2, 1935, it was impossible in fact for either the debtor or the petitioner either to acquire or to hold gold for the purpose of discharging the obligations under the said indentures.

[fol. 112] 22. The court erred in ruling that payment of the rentals under the indentures mentioned in the petition in gold was legally impossible on July 1, 1934, October 1, 1934 or January 1, 1935.

23. The court erred in ruling that it was legally impossible on July 1, 1934, October 1, 1934, or January 1, 1935 for the debtor to pay the petitioner a quantity of gold equal in amount to the number of dollars mentioned in the said indentures of the gold coin of the United States of the standard of weight and fineness of the years mentioned in the said indentures.

24. The court erred in ruling that the equivalent of the quantity of gold payable as rentals under the several indentures mentioned in the petition in United States currency is the amount of United States currency which the petitioner could have legally obtained for the said quantity of gold if the same had been paid to it on the respective dates on which the instalments of rental were due under the indentures.

25. The court erred in ruling that the equivalent of the quantity of gold payable as rentals under the several indentures mentioned in the petition in United States currency is the amount of money which the said quantity of gold would be worth to the petitioner for the purposes for

which it could legally be used on the respective dates on which the instalments of rental were due under the indentures.

26. The court erred in ruling that the equivalent in currency of the quantity of gold called for by the several indentures mentioned in the petition on July 1, 1934, October 1, 1934 and January 1, 1935, was at the rate of $20.67 per ounce.

27. The court erred in holding that claim may be established against the debtor for an amount obtained by multiplying the number of ounces of pure gold provided in the indentures by $20.67 per ounce.

28. The court erred in holding that the legislation passed by Congress subsequent to January 1, 1934, and the regulations issued thereunder do not warrant a conclusion different from that of McLellan, J. in the earlier case, namely, Holyoke Water Power Company v. American Writing Paper Company, Inc., Law No. 5932.

29. The court erred in basing the measure of the peti- [fol. 113] tioner's recovery upon the assumption that the petitioner would perform or would have performed an act contrary to and punishable under the laws of the United States, namely, in July or October, 1934, or in January, 1935, receiving gold in any form into its possession.

30. The court erred in holding that the petitioner can not claim any better position that that in which it would have been placed had gold been delivered to it in accordance with the provisions of the indentures.

31. That the court erred in denying the petitioner's motion for a finding for the petitioner.

32. That the court erred in allowing the debtor's motion that the petitioner's petition be dismissed.

33. That the court erred in not granting the relief prayed for in the petition.

Wherefore, the appellant prays that the aforesaid decree may be reversed and that the United States District Court for the District of Massachusetts be ordered to enter a de-

cree in accordance with the prayer of the petition or in such form as the Circuit Court of Appeals shall deem just.

Bentley W. Warren, Nathan P. Avery, James M. Healy, Donald C. Starr, Attorneys for Petitioner, Appellant. Warren, Garfield, Whiteside & Lamson, Avery, Healy & Button, of Counsel.

August 23, 1935.

RECITAL AS TO BOND ON APPEAL

Also on the said twenty-fourth day of August, 1935, a bond on appeal in the sum of two hundred fifty dollars ($250) was filed by the Holyoke Water Power Company and approved by the court, the American Surety Company of New York acting as surety.

[fol. 114] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 55719. In Bankruptcy

In the Matter of AMERICAN WRITING PAPER COMPANY, INCORPORATED, Debtor under Section 77 B.

Avery, Gaylord, Healy & Button, Warren, Garfield, Whiteside & Lamson, Phipps, Durgin & Cook, Neal, Shaffner & Knowlton, Abbott, Dane, Buffum & Howe, Ropes, Gray, Boyden & Perkins. Max J. Moskow, Abraham Kamberg, Herrick, Smith, Donald & Farley, Phillips-Ketchum, Robert Cutler, David M. Palley, Jacob J. Kaplan, Nutter, McClennen & Fish.

DOCKET ENTRIES

1934.

June 23. Petition filed.
23. McLellan, J.—Order approving petition.
23. Order of notice to creditors and stockholders, retble. July 24th at 11 a. m.
23. Order authorizing debtor to continue business.

DOCKET ENTRIES—Continued

1934,

July 13. Petitions of Holyoke Water Power Co. for leave to intervene, for leave to bring proceedings and to modify injunction—Set down for hearing on June 24—Certificate of notice of hearing.

24. Affidavit of publication and mailing notices.

24. McLellan, J.—Hearing—Continued to Aug. 21st. at 11 a. m. on petition for leave to intervene and to discuss appointment of Master.

24. Order continuing debtor in business; claims to be filed with debtor on or before October 24, 1934.

24. Petition by Central Hanover Bank and Trust Co. et al., trustees for leave to intervene—Order allowing petition to intervene.

24. Petition by International Trustee for Protection of Bondholders for leave to interevene—Order allowing petition to intervene.

[fol. 115]

July 24. Petition by Holyoke Water Power Co. for leave to bring suit granted.

24. Order modifying injunction so as to allow Holyoke Water Power Co. to bring suit.

24. Balance sheet of corporation of December 31, 1933.

24. Order approving officer's compensation.

24. Petition of debtor for approval of officers' compensation.

24. Petition for order appointing special counsel for debtor—Order appointing special counsel.

Aug. 21. McLellan, J.—Order allowing petition of Holyoke Water Power Co. to intervene.

21. McLellan, J.—Order modifying injunction as to suits against debtor.

21. List of stockholders (4 vols.)

21. List of accounts payable (Sched. B).

21. Certificate of debtor as to lists of creditors and stockholders (2 parts).

28. List of persons holding or claiming interest on bonds (Sched. A & A-1).

Aug. 28. Supplemental list of creditors or claimants (Sched. B).

DOCKET ENTRIES—Continued

1934.

Aug. 28. List of suits against debtor (Sched. C).
28. Certificate of debtor as to lists of bondholders, creditors and claimants.
Sept. 7. Petition by debtor in re Registration of securities—Set down for hearing on Sept. 12th at 10 a. m.
12. Affidavit of notice.
12. McLellan, J.—Hearing—Order for registration of securities.
12. Petition for leave to employ counsel—Order authorizing debtor to employ counsel.
Oct. 1. Affidavit of publication and notices.
1. McLellan, J.—Hearing—Debtor continued in business. Debtor's report received. Petition by John P. Van Kirk for leave to intervene, etc.
4. McLellan, J.—Petition for leave to intervene granted; petition for survey and for adjudica-
[fol. 116]
tion as to insolvency and interest of stockholders reserved for further consideration.
Oct. 24. Petition by N. Frank & Sons to intervene—Set down for hearing on Oct. 29. Certificate of notice.
24. Certificate of John G. Pennypacker, James B. Tailer and Harry Hoffman.
29. McLellan, J.—Hearing continued one week.
31. Amended petition by Frank & Sons to intervene. Set down for hearing on Nov. 5—Certificate of notice.
Nov. 5. McLellan, J.—Hearing—Amended petition for leave to intervene granted—no one appearing to oppose.
6. Petition by M. Frank & Sons for reclamation.
5. Petition of Central Hanover Bank and Trust Company et al. for modification of injunction.
6. Affidavit of notice to creditors.
6. Certificate of debtor as to additional list of bondholders.
6. Report of claims filed.
8. Order on amended petition to intervene.
8. Petition to modify injunction set down for hearing on Nov. 19. Certificate of notice.

DOCKET ENTRIES—Continued

1934.

Nov. 16. Amendment to certificate of notice.
19. McLellan, J.—Hearing—Injunction modified.
24. Petition for order extending time to affirm or reject leases and executory contracts.
24. McLellan, J.—Order extending time for adopting or disapproving leases extended three months.

1935.

Jan. 18. Petition by Holyoke Water Power Co. relative to payment of rentals by the debtor.
21. Order of notice on petition of Holyoke Water Power Co. issued.
30. Answer of debtor to petition for payment of rentals.

Mar. 5. Stipulation as to petition of Holyoke Water Power Company relative to payment of rentals.
22. Petition for extension of time to affirm or reject leases and executory contracts.

[fol. 117]

Mar. 22. McLellan, J.—Order extending time as to leases and contracts to May 25, 1935.

Apr. 9. Amended answer of debtor to petition of Holyoke Water Power Co.
9. Hearing on petition of Holyoke Water Power Co. —Continued to April 10th.
10. Brewster, J.—Hearing on petition of Holyoke Water Power Co. relative to payment of rentals —Decision reserved.

May 14. Petition by H. A. Hughes et al. for leave to intervene—Set down for hearing on May 20. Certif. of notice.
22. Petition of further extension to affirm or reject leases and executory contracts.
22. McLellan, J.—Time for affirming or rejecting leases and contracts extended to July 25, 1935.
27. Petition of Choate, Hall & Stewart, attys., for reimbursement of expenses assented to by counsel for debtor—granted.

June 6. Petition to refer disputed claims to a Special Master.

DOCKET ENTRIES—Continued

1935.

June 6. Petition for order approving notice of termination of two Electrical Power contracts with Holyoke Water Power Co.

6. Petition for order on report of claims.

6. Petition for order to enter into power contract with City of Holyoke.

10. McLellan, J.—Hearing.

Claims of Holyoke Water Power Co. referred to Charles F. Lovejoy as Spec'l Master for consideration and report.

Order allowing claims set forth in schedule A, of order on claims.

Claims of American Window Cleaning Co. et al., referred to Walter L. Stevens as Special Master for consideration and report.

June 10. McLellan, J.—Hearing on petitions for order approving notice of termination of contracts and

[fol. 118]

on petition to enter into power contract continued to June 24th at 10:30 a. m.

June 10. Stipulation in re petition for reclamation.

10. McLellan, J.—Petition of N. Frank & Sons for reclamation dismissed.

24. McLellan, J.—Hearing. Order aproving giving notice of termination of electric power contracts with Holyoke Water Power Co. Hear'g on petn. to enter into power contract with Holyoke Water Power Co.—no order made.

July 2. Brewster, J.—Opinion.

2. Brewster, J.—Motion of debtor that petition of Holyoke Water Power Co. be denied and dismissed—granted.

2. Brewster, J.—Mo. of Holyoke Water Power Co. relative to payment of rentals—Denied.

10. McLellan, J.—Order on petition of Creditors Committee for leave to intervene.

10. Petition by Creditors' Committee for appointment of Trustee appraisers, etc.

17. Petition by John Van Kirk for survey of entire business set down for hearing on July 22, at 12 m.

DOCKET ENTRIES—Continued

1935.

July 22. McLellan, J.—Hearing—Order for survey by Thomas H. Blodgett without expense. No order on petition by John P. Van Kirk for survey of entire business.

10. McLellan, J.—Order of notice on petition for appointment of trustee, appraisers, etc. set down hearing on September 9th at 12 m.

27. Brewster, J.—Final decree on petition of Holyoke Water Power Co. to establish amount of rentals due.

Aug. 13. Petition of Choate, Hall & Stewart for fees and disbursements. Set down for hearing Aug. 19, at 12 m. Certif. of notice of hearing.

19. Petition of Russell L. Davenport for fees and allowances.

19. McLellan, J.—Hearing. Order making allowances on account to Choate, Hall & Stewart and to Russell L. Davenport.

[fol. 119]

Aug. 20. Petition of Choate, Hall & Stewart for disbursements.

22. Stipulation of parties as to payments of rentals to Holyoke Water Co.

23. Petition of John T. Harbine, Jr., for leave to intervene.

24. Petition of Holyoke Water Power Co. for appeal and assign't of errors.

24. Bond on appeal filed.

24. Brewster, J.—Bond approved and appeal allowed.

24. Citation on appeal issued, retble. Sept. 23, 1935.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 24, 1935

To the Clerk:

You are hereby requested to make up and certify as a record on plaintiff's appeal a transcript of the following, to wit:

1. Petition of Holyoke Water Power Company relative to payments of rentals by the debtor.
2. Stipulation relative to payment of rentals filed March 15, 1935.
3. Amended answer of debtor.
4. All the testimony reduced.
5. Plaintiff's Exhibits 1, 2, and 3.
6. Debtor's exhibits numbers A and B.
7. The motion of the plaintiff for a finding for the plaintiff and order thereon.
8. The motion of the debtor that the petition of the Holyoke Water Power Company be denied and dismissed and order thereon.
9. Plaintiff's requests for rulings of law.
10. Debtor's requests for rulings of law.
11. The opinion of the court.
12. The decree.
13. Recital of filing of petition for appeal and copy of assignment of errors.
14. This præcipe.

[fol. 120] 15. Docket entries.

Bentley W. Warren, Nathan P. Avery, James M. Healy, Donald C. Starr, Attorneys for the Plaintiff.
Warren, Garfield, Whiteside & Lamson, Avery, Healy & Button, of Counsel.

Service acknowledged this twenty-second day of August, 1935.

Choate, Hall & Stewart.

RECITAL AS TO CITATION AND SERVICE

A citation on appeal was issued on the twenty-fourth day of August, A. D. 1935, being made returnable in the United States Circuit Court of Appeals on the twenty-third day of September, A. D. 1935. Service of said citation was duly acknowledged by counsel for the American Writing Paper Company, Inc., debtor.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 121] [MEMORANDUM.—An order of enlargement of time for docketing case to, and including, October 23, 1935, is here omitted. A. I. Charron, Clerk.]

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1935

No. 3062

HOLYOKE WATER POWER COMPANY, Petitioner, Appellant,

v.

AMERICAN WRITING PAPER COMPANY, INC., Debtor, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—April 15, 1936

WILSON, J.:

The appellee seeks to reorganize under Sec. 77-B of the Bankruptcy Act. The appellant filed a petition in the bankruptcy court as an intervening creditor to determine the amount of a claim of the petitioner for rentals under perpetual leases by it to appellee's predecessors in title of thirteen water power rights on the Connecticut River at Holyoke, Massachusetts, entered into between 1880 and 1898 pursuant to certain proposals of sale which were incorporated in the leases.

In 1859 the Holyoke Water Company acquired the water power privileges on the Connecticut River at Holyoke, which it divided up into units of 16 hour mill powers. Of these units twenty-seven with mill sites were acquired by [fol. 123] the appellee by mesne conveyances from the grantees of the appellant. The provisions of fourteen of these leases entered into prior to 1880 were under construction by this court in 68 Fed. (2d) 261, in which the rental per unit was payable in silver bullion of two hundred and sixty ounces, troy weight, of the present standard of weight and fineness of the silver coin of the United States, or an

equivalent in gold at the option of the grantee at the time of payment.

In the thirteen indentures entered into after 1880, the rentals were made payable in a quantity of gold equal in amount to * * * dollars of gold coin of the current standard of weight and fineness, or its equivalent in currency of the United States.

The District Court held that, if gold had been delivered to the petitioner in payment of the rentals under the indentures, it could not have received therefor, under the order of the Secretary of the Treasury issued on January 15, 1934, more than $20.67 per ounce of pure gold, and issued a decree ordering that the petitioner's claim be established by multiplying the total number of ounces of pure gold included in the payments due July 1, 1934, October 1, 1934, and January 1, 1935, by $20.67 per ounce. From this decree the petitioner appealed.

While the petitioner has twenty-five assignments of error, they raise only a single issue, viz: what measure is to be applied in determining the equivalent in currency of the quantity of gold called for by the indentures in payment of the rentals on July 1, 1934, October 1, 1934, and January 1, 1935?

The parties have selected the indenture entered into on March 1, 1895, as typical of the other twelve indentures, which together form the basis of the petitioner's claim, and which provides for the payment of rental as follows:

"A quantity of gold which shall be equal to $1500 of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency."

Counsel for the appellee urges that this is not a commodity contract. It, however, calls for the payment of "a quantity of gold" of an amount equal to the gold content of $1500 [fol. 124] of gold coins, or "the equivalent of this commodity in United States currency."

In other words, in the indenture dated March 1, 1895, the appellee agreed to pay annually for each unit of power, either 80.625 ounces, troy weight, of gold, nine-tenths fine, being equal in amount to $1500 of gold coin of the weight and fineness of gold coin of 1894, or the equivalent of this amount of gold in United States currency, which must mean in United States currency at the date of payment.

That other years than 1894 were selected in the earlier indentures involved to determine the weight and fineness of the gold coin fixed as a measure of the quantity of gold to be used in payment of the rental is immaterial, since the weight and finess of the gold in the dollar, the basic unit of United States currency, remained the same during the entire period covered by these indentures, Sec. 3511, R. S., Sec. 1, Chap. 41, Act of March 14, 1900 (31 Stat. 45), until the weight was changed by presidential proclamation on January 31, 1934.

The amount of the petitioner's claim must be determined in view of the following proclamations by the President and Secretary of the Treasury and Acts of Congress: On March 6, 1933, the President, stating that there had been a heavy withdrawal of gold and currency from our banking institutions for the purpose of hoarding and extensive speculative activity abroad in foreign exchange, which had resulted in severe drains on the nation's stocks of gold, declared a bank holiday until March 9, 1933. On that day the Secretary of the Treasury, with the President's approval, issued instructions to the Treasurer of the United States to make payments in gold in any form only under license issued by the Secretary.

On March 9, 1933, the President approved the Emergency Banking Act (48 Stat. 1). This Act amended Sec. 11 of the Federal Reserve Act (39 Stat. 752) and authorized the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States all gold coin, gold bullion and gold certificates owned by them, and that the Secretary should pay therefor an equivalent [fol. 125] amount of any other form of coin or currency coined or issued under the laws of the United States.

By executive order of April 5, 1933, forbidding hoarding of gold, all persons were required to deilver on or before May 1, 1933, to stated banks, all gold coin, gold bullion and gold certificates, the holder to receive an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States.

By Sec. 43 of the Act of May 12, 1933 (48 Stat. 51) it was provided that the President should have authority, upon the making of prescribed findings and in the circumstances stated, "to fix the weight of the gold dollar in grain nine-tenths fine * * * at such amounts as he finds neces-

sary from his investigation to stabilize domestic prices or to protect foreign commerce against the adverse effect of depreciated foreign currencies"; and it was further provided that the gold dollar, the weight of which is so fixed, shall be the standard unit of value, and that all forms of money shall be maintained at a parity with this standard, but that "in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than fifty per centum."

Congress then passed the Joint Resolution of June 5, 1933, which provided as follows:

"* * * every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts. * * * As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of the Federal Reserve Banks and national banking associations;"

[fol. 126] On December 28, 1933, the Secretary of the Treasury, pursuant to the Act of March 9, 1933, ordered every person within the jurisdiction of the United States to deliver to the Treasurer of the United States all gold coin, gold bullion and gold certificates then held by him, for which the Treasurer agreed to pay the then equivalent of gold coin or bullion, or $20.67 per ounce of pure gold, which price was based on the then gold content of the dollar.

On January 15, 1934, the Secretary of the Treasury by proclamation fixed January 17 as the last day for the delivery of gold under the order of December 28, 1933, in

which he agreed to pay for pure gold held in non-compliance with the order of December 28, 1933, and delivered thereafter, the sum of $20.67 per ounce, but with the reservation that there be paid for such gold "only such part or none of the amount" thus fixed, as the Secretary shall from time to time prescribe.

Then followed the Gold Reserve Act of January 30, 1934, Sec. 15 of which provided that:

"Wherever reference is made in this Act to equivalents as between dollars or currency of the United States and gold, one dollar or one dollar face amount of any currency of the United States equals such a number of grains of gold, nine tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar (see Sec. 3511, R. S., Sec. 1, Chap. 41, 31 Stat. 45) under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight tenths grains of gold, nine tenths fine, and thereafter such a number of grains of gold, nine tenths fine, as the President shall have fixed under such authority."

Up to this time the equivalent of the quantity of gold provided for to be paid as rental in the indenture here under consideration was $1500 in gold dollars of 25.8 grains, nine tenths fine, or its equivalent in currency.

On the thirty-first day of January, 1934, the President issued a proclamation by which the content of the gold dollar was reduced so that thereafter it should contain only 15 5/21 grains of gold, nine tenths fine, instead of 25.8 [fol. 127] grains as formerly, so that from and after January 31, 1934, the equivalent of an ounce of pure gold measured in terms of the new gold dollar was $35.00 per ounce instead of $20.67 prior to January 31, 1934.

The question then is: the first option open to appellee to pay the rental in a quantity of gold equal to $1500 of gold coin of the standard weight and fineness of gold coin of the year 1894, having been rendered impossible of performance by executive orders, the Joint Resolution of June 5, 1933, and the orders of the Secretary of the Treasury on December 28, 1933, and January 15, 1934, and the gold dollar, the standard unit of value of United States currency, having

been devalued on January 31, 1934, by order of the President under the authority vested in him by the Act of May 12, 1933, and the Gold Reserve Act of January 30, 1934, what was the equivalent of a quantity of gold equal to $1500 of gold coin of the standard weight and fineness in 1894 in currency of the United States after January 31, 1934, when the rentals under these indentures became due?

Unless the Joint Resolution of June 5, 1933, applies to these indentures, we think the equivalent in currency of the quantity of gold named in these indentures for rentals would have to be determined in the devaluated dollar of 15 5/21 grains, which in the indenture under consideration would be $2539.69 at the rate of $31.50 per ounce for 80.625 ounces, nine tenths fine.

The judge of the District Court in these proceedings following a prior decision in the District Court in relation to rentals due prior to January 21, 1934, 9 Fed. Sup. p. 451, held that the Joint Resolution of June 5, 1933, was not applicable to the provision in these indentures.

Counsel for the appellant contends that this ruling of the District Court is not open to the appellee to contest before this court, since it did not appeal from the ruling of the District Court; but we think it is open to the appellee to urge matter appearing in the record in support of the judgment of the District Court, though his argument may involve an attack upon the reasoning of the lower court, or an insistence upon a matter overlooked or ignored by it. [fol. 128] United States v. American Railway Express Co., 265 U. S. 425, 435; Union Tool Co. v. Wilson, 259 U. S. 107, 111.

The Joint Resolution of June 5, 1933, did not affect the amount due as rentals prior to January 31, 1934, because the standard unit of value had not been changed, and did not originally in express terms apply to the provisions in these indentures, since it only applied where the obligee had the option, or right, to require payment in gold, or in a particular kind of coin or currency, or in an amount of money of the United States measured thereby. Prior to the passage of the Resolution the option to pay the rentals in a quantity of gold equal to $1500 of gold coin or in the

equivalent of this amount in currency was not in the obligee or petitioner, but rested with the obligor.

However, by the Acts of Congress and the proclamations of the President and Secretary of the Treasury above referred to, the option to discharge the obligation of the rentals by tendering the quantity of gold named in the indentures was no longer open to the obligor, thus eliminating from the indentures any option as to method of payment. The effect was to give the petitioner and obligee the right to demand the equivalent in currency of $1500 in gold coin in payment, Restatement of the Law of Contracts, (Am. Law Inst.) Sec. 469, and the obligor the right to discharge his obligation by tendering the equivalent in currency of the number of dollars in gold coin named in the rental provisions, which brought these indentures within the purview of the Joint Resolution.

The Supreme Court in Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240, p. 314, referring to the provision in the bonds of the defendant to pay the principal amount and coupons due February 1, 1934, in gold coin of the weight and fineness, in one instance of February 1, 1930, and in two other cases of May 1, 1903, said: that "if the clauses are treated as 'gold value' clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition," obviously referring to the prohibition contained in the Joint Resolu- [fol. 129] tion. Therefore, while the indentures involved here originally were contracts for the payment of gold as a commodity measured in gold dollars, by the Acts of Congress and the proclamations of the President and the Secretary of the Treasury above referred to, they have become contracts for the payment of money measured in terms of gold and so are also hostile to the policy of Congress.

In other words, the provisions as to rentals in these indentures by reason of the exclusion of gold for monetary use have become gold value clauses within the meaning of the decisions in Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240, and Nortz v. United States, 294 U. S. 317; and the rentals measured in terms of dollars, viz.: $1500 of gold coin of the United States of the weight and fineness of the coinage of 1894 became, under the Joint Resolution, dischargeable dollar for dollar in any currency which was legal tender when they became due.

As Mr. Justice Stone said in his concurring opinion in Perry v. United States, 294 U. S. at p. 360: "It is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery."

We do not think the case is to be decided on the basis of damages for a breach of the contract to pay the rentals by a delivery of a quantity of gold. That has become impossible by an Act of Congress within its constitutional powers, see Nortz v. United States, supra, p. 328, and the appellee is not responsible for any default in this respect. These proceedings are for the purpose of ascertaining the amount due as an equivalent in currency, the payment of which would be in full discharge of the obligation.

Nor do we think the amount due is measured by the market price of gold in London, or what could be obtained for certain kinds of gold at the United States Mint, or what the Secretary of the Treasury might determine he would pay for gold illegally held and delivered after January 17, 1934. Payment in gold is excluded from consideration. The appellee could not obtain the gold, nor could it use it for monetary purposes. It cannot be fairly said that on July 1, 1934, there was any market price for gold in this [fol. 130] country except the several kinds enumerated in the proclamation of the Secretary, none of which can be used for monetary purposes to discharge an obligation of this kind. The sum of $20.67 per ounce, which the Secretary continued to pay, if he did, after January 17, 1934, was not a continuing offer, but one which he might withdraw or reduce at any time.

It is suggested that the Joint Resolution, if applied to this case, is unconstitutional. The Supreme Court held that the basis for its constitutionality is the power vested in Congress to regulate the coinage and value of money. Since the gold clause in corporate bonds are of so common occurrence and involve such large amounts as to seriously interfere with the regulation of the currency of the United States, these contracts in corporate bonds to pay in gold must yield to this constitutional power of Congress.

But it is urged that provisions of the kind found in these indentures are so uncommon that they cannot be held to interfere with the constitutional power vested in Congress to regulate the currency and, therefore, the Joint Resolution, if applied here, deprives the appellant of its property

without due process, and is beyond the power of Congress.

While such contracts may interfere with the constitutional power to regulate currency in a much lesser degree than the gold clause in corporate bonds or in gold certificates, the degree is not controlling. The extent of the interference is not for this court to determine. If Congress has determined that there is in fact interference with its constitutional powers, any contract causing such interference must yield to congressional authority.

The court said in Norman v. Baltimore & Ohio R. R. Co., supra, page 311:

"That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether may may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its [fol. 131] action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

The Joint Resolution recites the determination of Congress as follows:

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

Congress has made no exception of unusual contracts, such as these indentures, which alone may have only slight effect on the constitutional power to regulate the currency of the country. This court can make none because of the lesser degree by which these indentures restrict that power,

especially under the emergency found by Congress in 1933. Congress having declared in the Joint Resolution that all obligations heretofore or hereafter incurred that are measured in terms of gold are prohibited, and are payable dollar for dollar in any currency which is legal tender at the time of payment, we think these indentures come within the intent of the Resolution. If hardships follow, they must be borne. With the wisdom of such a policy the courts are not concerned.

It is true that if, under the typical indenture under consideration here, the petitioner was paid 80.625 ounces of gold, nine tenths fine, in gold dollars containing only 15 5/21 grains of gold, nine tenths fine, the equivalent in currency would be approximately $2539.69, while if the obligation were discharged dollar for dollar, it would receive only $1500 in the depreciated currency,—which, by the way, is the same amount it would receive for 80.625 ounces of gold [fol. 132] measured in gold dollars of 25.8 grains, nine tenths fine, or in currency based on the same standard.

Undoubtedly the draftsman of these indentures sought to stabilize the amount the petitioner would receive as rental, regardless of the fluctuation in the currency, but if by so doing the indentures in such an emergency as existed in 1933 added in some degree to the interference by gold clauses in other obligations with the constitutional power of Congress to regulate the currency, the petitioner must accept any action of Congress with that end in view.

The petitioner can pay its taxes, workmen, for materials and interest on its obligations and all other expenses in the same currency it receives, which is legal tender for all public or private debts. It does not have to pay out currency based on a standard unit of value containing 25.8 grains of gold and receive currency based on a unit of value containing 15 5/21 grains of gold. It receives and pays out currency based on the same standard, viz.: a gold dollar containing 15 5/21 grains of gold, nine tenths fine. Except in so far as the prices of labor and materials may have been increased by the devaluation of the dollar, it suffers no hardship. The prices of labor and materials are always subject to fluctuation without any change in the standard unit of value of the currency.

Nor is the appellant the only one affected by a change in the standard unit of our currency. Every person whose

income is derived from a stated salary, or wage, or is derived from interest on bonds, or dividends on stocks, may be affected in the same way, though not to the same extent.

In view of the intent of the government as expressed in the several executive orders and proclamations of the President and Secretary of the Treasury, the Joint Resolution and Acts of Congress above referred to, we think the rentals in these indentures may be discharged by the payment, dollar by dollar, of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 [fol. 133] in any currency which was legal tender for public or private debts on the due dates of the rentals.

Since we arrive at the same result as to the amount of the petitioner's claim as the District Court, the proper deductions being agreed upon, the mandate may be:

The decree of the District Court is affirmed as to the amount of the petitioner's claim with costs of this court to the appellee.

Morton, J., concurs on the ground that the case is within the scope of the decisions and opinions in the Gold Clause Cases, ubi supra.

[fol. 134] In United States Circuit Court of Appeals, First Circuit

Petition for Leave to Appeal to the Circuit Court of Appeals—Filed August 23, 1935

Your petitioner, Holyoke Water Power Company, being aggrieved by a final decree entered in the above-entitled proceeding on the twenty-seventh day of July, 1935, in the District Court for the District of Massachusetts, does hereby petition for leave to appeal to the United States Circuit Court of Appeals for the First Circuit.

Bentley W. Warren, Nathan P. Avery, James M. Healy, Donald C. Starr, Attorneys for Holyoke Water Power Company, Petitioner. Warren, Garfield, Whiteside & Lamson, Avery, Healy & Button, of Counsel.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITIONER'S ASSIGNMENT OF ERRORS—Filed August 23, 1935

[MEMORANDUM.—The assignment of errors being the same as the assignment of errors filed in the District Court, printed at page 77, is here omitted. A. I. Charron, Clerk.]

RECITAL AS TO HEARING

On January 7 and 8, 1936, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fifteenth day of April, A. D. 1936, the opinion of the court (page 91) was filed, and the following Final Decree was entered:

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—April 15, 1936

This cause came on to be heard January 7 and 8, 1936, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 15, 1936, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed as to the amount of the petitioner's claim with costs of this court to the appellee.

By the Court.

Arthur I. Charron, Clerk.

RECITAL AS TO ISSUANCE OF MANDATE

Thereafter, to wit, on May 16, 1936, mandate issued to the District Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 136] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Bentley Wirt Warren. File No. 40,720. U. S. Circuit Court of Appeals, First Circuit. Term No. 180. Holyoke Water Power Company, petitioner, vs. American Writing Paper Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed July 11, 1936. Term No. 180, O. T., 1936.

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Public Resolution No. 10 of 73d Congress, June 5, 1933	1 *et seq.*

In the

Supreme Court of the United States.

OCTOBER TERM, 1936.

HOLYOKE WATER POWER COMPANY, *Petitioner*,

v.

AMERICAN WRITING PAPER COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Your petitioner, Holyoke Water Power Company, prays that a writ of certiorari issue to review the final decree of the Circuit Court of Appeals for the First Circuit (R. 104), entered in the above-entitled cause on April 15, 1936, affirming the final decree of the District Court of the United States for the District of Massachusetts (R. 69).

The sole question involved by the error of the Circuit Court of Appeals is the application, after the devaluation of the dollar in January, 1934, of the Joint Resolution of Congress of June 5, 1933, to the rental provisions contained in certain indentures to which your petitioner and the respondent are parties.

Opinions Below.

One opinion was delivered by the District Court. It was written by District Judge Elisha H. Brewster and filed July 2, 1935. It appears on page 70 of the Record and is reported in 11 Fed. Supp. 518. In this opinion Judge Brewster referred to, and stated that he felt bound by, an earlier decision rendered by District Judge Hugh D. McLellan in a case involving rentals which became due under these same indentures before the devaluation of the dollar and between these same parties (R. 70, 71). The opinion in that case was filed January 2, 1935, and is reported in 9 Fed. Supp. 451.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilson, Bingham and Morton) was written by Wilson, J., was filed April 15, 1936, and appears at page 91 of the Record. It is reported in 83 Fed. (2d) 398.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U.S.C.A. sec. 347). The decree of the Circuit Court of Appeals was entered April 15, 1936. This petition for certiorari was filed before July 15, 1936.

Questions Presented.

1. Whether the Joint Resolution of June 5, 1933, applies to the rental provisions in the contracts in question.

This question involves the determination of the subordinate questions:

(*a*) Whether Congress intended by the passage of the Joint Resolution of June 5, 1933, to affect the discharge of contracts, such as those in question here, providing in ex-

press terms for the delivery, as rentals, of a quantity of gold as a commodity or the equivalent thereof in United States currency.

(*b*) Whether the application of the Joint Resolution to the contracts in question here would constitute the exercise by Congress of a power not delegated to it by the Constitution of the United States in contravention of Article X of the Amendments thereof.

(*c*) Whether the application of the Joint Resolution to the contracts in question here would constitute a deprivation of the property of the petitioner without due process of law in contravention of Article V of the Amendments to the Constitution of the United States.

The foregoing questions are presented by the error of the Circuit Court of Appeals in determining that the Joint Resolution is applicable to the contracts in question. If they be determined in favor of your petitioner, an additional question is presented, namely:

2. Whether, if the rental provisions may not be so discharged by force of the Joint Resolution, the equivalent in currency of the quantity of gold specified therein is to be determined with reference to the ratio between gold and currency established by law on the dates when the rentals in question became due.

Resolution Involved.

Public Resolution No. 10 of the 73d Congress, passed on June 5, 1933, otherwise and herein referred to as the Joint Resolution, is set forth in Appendix A annexed to this petition.

Statement of Matter Involved.

Your petitioner, in 1859, acquired the right to impound the water of the Connecticut River at Holyoke, Massachu-

setts, and to dispose of rights to use the same for power and manufacturing purposes (R. 91). Some of these rights, in units called "mill powers," the Company leased, between 1880 and 1898, under thirteen indentures, to predecessors in title of the respondent American Writing Paper Company, which later acquired them by mesne conveyances (R. 91, 92).

The terms under which these mill powers were leased and are held provided that the Water Power Company should forever maintain and keep in order and repair the dam and principal canals (Ex. 1, Art. III, R. 28), and that the grantees and their successors should pay forever a yearly rental for the mill powers. The rental provision which is agreed to be typical of all those in question in this case calls for the annual payment in perpetuity of—

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the coinage of the year one thousand eight hundred and ninety-four or the equivalent of this commodity in United States currency . . ." (R. 23, next to the last line).

(It should be noted that this provision is inaccurately quoted in the opinion of the Circuit Court of Appeals, at page 92 of the Record, from which the words "in amount" are omitted.)

The Water Power Company brought a petition to determine the amount of its claims under the said thirteen indentures, for rentals payable July 1, 1934, October 1, 1934, and January 1, 1935 (these dates being subsequent to the devaluation of the dollar). The District Court held that the contracts were not within the meaning of the provisions of the Joint Resolution and so were not to be discharged "dollar for dollar" (R. 73), quoting with approval from

the ruling and finding of Judge McLellan, in the earlier case resting upon these same indentures, that the indentures contain no covenant to pay any definite sum of money, and that the discharge of the obligations "dollar for dollar" could not be decreed without doing violence to the intention of the parties (R. 71). The Court then held, however, that the obligor's option to deliver quantities of gold in payment of the rentals had become impossible of performance by virtue of legislation and executive orders restricting the use of gold (R. 73), and that the equivalent of the various quantities of gold in currency was to be established by multiplying the number of ounces of pure gold by $20.67 per ounce (R. 77, 69).

A sum so computed having already been paid, the bill was dismissed (R. 69). The Water Power Company, your petitioner, appealed to the Circuit Court of Appeals. That Court held, contrary to the opinion of the District Court, that the Joint Resolution did apply to these contracts, stating (R. 101):

> "the rentals in these indentures may be discharged by the payment, dollar by [*sic*] dollar, of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals."

Although the Circuit Court of Appeals thus disagreed with the conclusion of the District Court as to the applicability of the Joint Resolution, the result, in terms of dollars in currency payable, was the same, and the decree of the District Court was accordingly affirmed as to the amount of the petitioner's claim (R. 102, 104).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the decree of the District Court as to the amount of the petitioner's claim (R. 104).

2. In holding that the rentals in these indentures may be discharged by the payment, "dollar by dollar," of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals (R. 101, 102).

3. In holding, in substance, that a resolution by Congress providing that contracts for the delivery of a quantity of gold as a commodity, or, in the alternative, for the payment of the equivalent of this commodity in United States currency, may be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named therein equals in gold coin of a certain weight and fineness, has a reasonable relation to the end which Congress had in view in passing the Joint Resolution (R. 99, 100).

4. In failing to hold that Congress, in the exercise of its power to regulate the currency, has interfered with contracts providing for the delivery of a quantity of gold as a commodity (if the Court was right in holding that such contracts are within the terms of the Joint Resolution) in violation of Article V and of Article X of the Amendments to the Constitution of the United States.

5. In holding (R. 98) that the rental provisions in these indentures are "gold value clauses" within the meaning of the decisions in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and *Nortz* v. *United States*, 294 U.S. 317.

6. In holding, in substance, (R. 100, l. 22 *et seq.*) that the Joint Resolution provides that all obligations that are

measured in terms of gold are payable dollar for dollar in any currency which is legal tender at the time of payment.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals, in applying the Joint Resolution to the contracts in question here, disregards the express provision of that Resolution that as used in the Resolution, "obligation" means an obligation payable in money of the United States (Appendix A, sub-paragraph (b)).

2. The legislative history of the Joint Resolution indicates that the condition sought to be remedied by the Resolution was the existence of negotiable obligations to repay money already advanced and that an intention to interfere with the discharge of commodity contracts was not only absent, but was specifically disclaimed (see Appendix B).

3. The Circuit Court of Appeals, in so far as it rested its decision upon the Gold Cases, or upon any of them, misconceived the purport and scope of those decisions, all of which involved the effect to be given to obligations payable in gold coin of the United States, and constitute no authority for the application of the Joint Resoluion to a non-negotiable contract calling for the delivery of gold as a commodity or for the payment of its equivalent in currency.

4. The application of the Joint Resolution to the contracts in question here would constitute the exercise by Congress, under the guise of an exercise of its power to regulate the currency, of a power not delegated to it by the Constitution, and would therefore contravene Article X of the Amendments thereof.

5. The application of the Joint Resolution to the contracts in question here would constitute a direct deprivation of the rights of your petitioner under contracts

providing for the delivery of a commodity, and would therefore contravene Article V of the Amendments to the Constitution of the United States.

6. The decision of the Circuit Court of Appeals is inconsistent with the opinion of Mr. Justice Bradley, which was necessary to the decision in the *Legal Tender Cases,* 12 Wall. 457 (1870). The learned justice (from whose opinion the Honorable Chief Justice of this Court quoted with approval in his opinion in *Norman* v. *B. & O. R.R.,* 294 U.S. 240, at p. 307) stated that—

> "If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is *bona fide* for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed" (12 Wall. at p. 566).

It is not difficult to suppose that the contracts involved in the instant case were made in reliance upon this utterance of the highest judicial authority.

7. The question of whether the Joint Resolution should be so construed as to affect the discharge of a contract in which the parties expressly provided for the delivery of a quantity of gold as a commodity, or for the payment of an equivalent amount of currency, is a question of great importance to your petitioner. Since the performance of its obligations to maintain the dam and canals at Holyoke in perpetuity without loss necessarily rests upon the continued receipt of income commensurate with the financial requirements of this performance, and since it may reasonably be expected that these requirements will increase in accordance with the declared policy of the government in devaluating the dollar, the determination of this question involves the continued solvency and existence of the Holyoke Water Power Company. These rights of the Water Power Company are necessarily also the rights of its many

stockholders, and they are to be affected by the final determination of this cause not only with reference to the past, nor even only to the immediate future, but to perpetuity.

As an illustration of what this decision means to the petitioner if not reversed, one might assume that, if in the recent New England floods the crest of the dam to a depth of five feet across the Connecticut River was carried away by the ice jam, the abutments of the gatehouse, the maintenance of which is necessary to the supply of water through the canals for indentured lessees, were weakened, and the cost of repairs was $100,000, then if, as is quite possible, such another flood should occur in the future, when prices and costs had been adapted to a 59-cent dollar (or in case of further devaluation to an even cheaper dollar than that), it can easily be seen that the petitioner would be quite unable to comply with the obligation placed upon it by the indentures, and intended to be safeguarded by the rentals of quantities of gold, to maintain at all times the hydraulic system essential for providing the water power to which the respondents in this case would be entitled under the indentures.

8. The vital importance of this question to your petitioner and its stockholders has its counterpart in the cases of other lessors of real estate or of rights in the nature of real estate, and of other parties entering into undertakings for the performance of burdensome obligations, other than for the mere payment of money, in the more or less distant future, such as continuing services, supply of materials, and maintenance and renewals of plants and buildings.

Your petitioner submits that the final determination by this Court of the questions of law involved in this case is therefore of the utmost importance to the rights of your petitioner and of its shareholders, both now and in perpetuity, and to other parties in similar circumstances, and

that this Court should therefore determine these questions.

The decision of the Circuit Court of Appeals is not only contrary to the intention of Congress in passing the Resolution upon which it is based, but is without precedent or authority in any of the decided cases of this Court in which the power of Congress to regulate the currency has been defined.

Unless the error in that decision be corrected by this Court, the effect will be to deprive your petitioner and its shareholders of substantial rights which are guaranteed by Articles V and X of the Amendments to the Constitution of the United States.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

HOLYOKE WATER POWER CO.
By BENTLEY W. WARREN,
Attorney for Petitioner.

Of Counsel:
NATHAN P. AVERY,
JAMES M. HEALY,
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Appendix A.

Joint Resolution of Congress of June 5, 1933.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby

repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

" 'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p.m."

Appendix B.

(The following is quoted from the petitioner's brief in rebuttal before the Circuit Court of Appeals, pp. 9 and 10.)

"Senator Borah at one point declared: '. . . I contend that Congress may declare that a dollar with 12.9

grains must be accepted in payment of a dollar of 25.8 grains. It may fix the value of the dollar, the value of the money. . . . I am not discussing now a commodity contract; I am discussing a contract to pay dollars' (vol. 77, Cong. Rec. No. 67, p. 4999), and again: 'It [the Government] does not assume to enter into a commodity contract. It does not assume to pay a certain amount of bullion. It agrees to pay so much money, and defines what the dollar is, etc., but it does not agree to deliver so much bullion. It is not a bullion contract, and is not so regarded. It is a negotiable instrument. The dollar sign is printed all over it.' (Ibid. p. 5001.) At another point in the debate, Senator Fletcher stated: '. . . This Joint Resolution deals with interest-bearing obligations. It does not disturb the base of the currency, as far as that item is concerned.'

"Further, an important reason for the passage of the Joint Resolution advanced by Representative Steagall was that 'a limitation of the effect of the Resolution to contracts between private persons and future contracts of the government, would seriously impair the power of the government to borrow money . . .' (77 Cong. Rec. No. 62, p. 4585). The rationale of this point was that, if gold obligations then existing were left untouched, investors would be loath to subscribe to new government loans not payable in gold while issues payable in gold were still outstanding and procurable in the market. Related arguments based upon the effect on investments generally were urged by the government in its argument in the *Norman* case. It is clear that any considerations of the effect of the governmental action upon the investment market for bonds could have no application to non-negotiable obligations, and that therefore Congress could not in this respect have contemplated interference with, for instance, non-negotiable leases."

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In the

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 180.

HOLYOKE WATER POWER COMPANY, PETITIONER,

v.

AMERICAN WRITING PAPER COMPANY, INC.,
DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR HOLYOKE WATER POWER COMPANY.

OPINIONS BELOW.

The opinion delivered by the District Court was written by District Judge Elisha H. Brewster and filed July 2, 1935. It appears on page 104 of the Record and is reported in 11 Fed. Supp. 518. In this opinion Judge Brewster referred to, and stated that he felt bound by, an earlier decision rendered by District Judge Hugh D. McLellan in a case involving rentals which became due under these same indentures before the devaluation of the dollar (R. 106). The opinion in that case was filed January 2, 1935, and is reported in 9 Fed. Supp. 451.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilson, Bingham and Morton) was written by

Wilson, J., was filed April 15, 1936, and appears at page 124 of the Record. It is reported in 83 Fed. (2d) 398.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered April 15, 1936 (R. 135). A petition for certiorari was filed in this Court on July 11, 1936, and was granted on October 12, 1936. The jurisdiction of this Court rests upon section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case.

This case is before this Court upon a writ of certiorari, granted October 12, 1936, to review a final decree of the Circuit Court of Appeals for the First Circuit (R. 135) which affirmed "as to the amount of the petitioner's claim" the decree made by the District Court (R. 103) and dismissed the bill of complaint.

The case was begun by a petition brought by the Holyoke Water Power Company, an intervening creditor in proceedings for the reorganization of the American Writing Paper Company, Inc., a corporation, under section 77-B of the Bankruptcy Act, to establish the amount of rentals due to the petitioner on July 1 and October 1, 1934, and on January 1, 1935, under thirteen indentures for the lease of mill powers, in connection with certain mill sites in Holyoke, Massachusetts.

In 1859 the Holyoke Water Power Company acquired the water-power privileges on the Connecticut River at Holyoke, consisting of a dam and three levels of canals. It divided this water power into units of 16-hour mill powers, determined by a certain head and a certain rate of flow. Of these, a number were sold under indentures to various

predecessors in title of the American Writing Paper Company, Inc. The provision in fourteen of these indentures, entered into prior to 1880, for rental payable in silver bullion, was the subject of construction in the case of *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, decided by the Circuit Court of Appeals for the First Circuit on December 15, 1933, as reported in 68 Fed. (2d) 261. The provision in thirteen other of these indentures, for rental payable in a quantity of gold or its equivalent in currency, is the subject of the dispute in this case. These thirteen indentures were executed on and between the dates September 12, 1881, and December 1, 1897, pursuant to Proposals of Sale which were expressly incorporated in and made a part of each of them.

These Proposals of Sale (R. 25-34) provided (R. 26, 27, Arts. III, VI, VII) that the Water Power Company should, under heavy penalties and liability for damages, forever maintain the dam at the head of the principal canals of such length and height as might be necessary in order to turn the water into the canals, and forever keep in good repair said canals, and from time to time remove and clear out obstructions that might accumulate therein; and that (R. 26, Art. V) "part of the consideration of every sale, and all that [was] to be allowed the grantors for the repairs, etc. by them assumed" should be secured to them in the form of a reservation of a perpetual annual rent.

The rents so reserved in the indentures, "in order to continue in the grantors an interest in common with the grantees, for the preservation and support of the mill powers" (Art. V of the Proposals of Sale, R. 26), were made payable under provisions which are admitted to have been substantially similar in each of the indentures, and of which a typical one provides for the payment of—

> "a quantity of gold which shall be equal in amount to $1500 of the gold coin of the United States of the

standard of the weight and fineness of the year 1894,* or the equivalent of this commodity in United States currency."

This rental was substituted for that (viz., 260 ounces of silver) contained in Article V (R. 27) of the proposals, in accordance with the provision contained in Article I (R. 25) for varying the terms and conditions of the proposals as the parties might agree in the deed.

The instalments of rental in question under this petition cover the calendar year 1934, and became due and payable on July 1, 1934, October 1, 1934, and January 1, 1935, as set forth in paragraph 3 of the petition (R. 4). All these dates were after the devaluation of the dollar on January 31, 1934.

The aggregate net number of troy ounces of gold .9 fine called for by the rental clauses for the three instalments here in suit is 2239.14169 (R. 16). This quantity, expressed in grains of gold .9 fine, is 1,074,788.0112 grains. Under the terms of the indentures the debtor had the option to pay the equivalent in currency of this quantity of gold instead of delivering the gold itself. Applying the measure established by the President on January 31, 1934, under authority of section 43, title III, of the Act approved May 12, 1933, as theretofore and by section 12 of the Gold Reserve Act of 1934 amended, that is, one dollar for each 15 5/21 grains, gives, under the definition in section 15 of said Gold Reserve Act (R. 72), $70,532.96 as the currency equivalent for said 1,074,788.0112 grains.

Likewise, to multiply 2239.14169 by $31.50, the price per ounce of .9 fine gold which corresponds to $35 as a price for pure gold (R. 16) gives $70,532.96. The same result is

* Various years from 1881 to 1894 were named, in all of which the standard of weight and fineness was the same, namely, 25.8 grains of gold .9 fine per dollar.

also reached by multiplying the total number of dollars mentioned in the indentures as the initial measure of the quantities of gold, *i.e.*, 45,500, by 23.22 (the number of grains of pure gold in the dollar on the dates of the indentures), dividing the product by 480 (the number of grains in a troy ounce), subtracting the number of ounces of pure gold representing the rebates (185.8348), and multiplying the result (2015.2275) by $35 (R. 14, 15). It is the latter method of computation which was employed by the cashier of the Water Power Company in making out the bills which were rendered to the Writing Paper Company, the total amounts of which thus equalled the total amount arrived at by the method above described (with the addition of $900, which it is agreed was included in the bills by mistake, R. 15).

Upon the theory of equivalency contended for by the debtor Writing Paper Company, on the other hand, based upon a value of $20.67 per ounce of gold .9 fine, the net total number of dollars payable was $42,558.48 (R. 8-10).

Cheques for the rentals which became due in July and October, 1934, in the total amount of $22,578.56, were sent to the appellant, which it collected, after expressly stating to the appellee that they did not constitute full payment.

A cheque for $19,979.93 was received by the appellant for the rentals due on January 2, 1935, which the appellant did not then deposit or collect. The appellant Water Power Company then brought this petition, praying for permission to collect the cheque so received on January 2, 1935, without prejudice to its rights to collect the balance which it alleged to be due, and for an order requiring the debtor, the appellee, to pay the balance of the full amounts of the rentals, computed at $35 per ounce of fine gold (R. 7).

It was later stipulated (R. 12) that the cheque received on January 2, 1935, for $19,979.93 might be collected by the Water Power Company without prejudice. The amounts

now sought by the appellant, therefore, represent the difference between the amounts of the cheques received by it for the rentals due on the three dates and the amounts of rental which it alleges to be due upon a basis of $1.00 for each 15 5/21 grains of gold .9 fine, or $35 per ounce of pure gold. These amounts are as follows (R. 15):

July 1, 1934	$15,129.92
October 1, 1934	207.88
January 1, 1935	13,536.68

The initial petition in the District Court, in this case, which, with its annexed appendices, is set forth in full in the Record, on pages 3 to 12, inclusive, quoted a portion of the opinion rendered by McLellan, J., in a previous action, brought before the devaluation of the dollar, in the District Court for rentals due January 2, 1934, under the same indentures as are in question here, in which that Court stated that—

> "The burden of proof is upon the plaintiff to establish his damages and the only relevant evidence submitted as to the market price of gold was the price obtainable from the Government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by executive order. On this basis the plaintiff was entitled to receive in currency at Holyoke, Massachusetts, on January 2, 1934, the sum of $20,887.86" (R. 5).

See *Holyoke Water Power Company* v. *American Writing Paper Company,* 9 Fed. Supp. 451, at 454.

The petition then stated that, in view of that opinion and of the fact that the price which the Government Mints

would pay for gold was, on each of the dates on which the three instalments of rent were payable, $35 an ounce, the petitioner demanded of the appellee the balance due it upon the basis of that price (R. 5, 6).

The answer, briefly summarized, denied the materiality of the Provisional Regulations issued under the Gold Reserve Act of 1934, denied further that the market price of fine gold purchased by the Government on the dates in question was $35 an ounce, and alleged that the sums already paid constituted full payment of the rentals (R. 13, 14).

The Water Power Company introduced evidence (R. 14-19) of the manner in which the rentals were computed upon its theory of recovery, as outlined above. It introduced evidence also that the market price of pure gold in London was, on July 2, 1934, substantially $34.75, and that the prices on October 1, 1934, and January 2, 1935, were $34.87 and $34.79, respectively, in addition to which there would have been payable, by any purchaser of gold in London importing it into the United States, the expense of three or four cents an ounce for charges (R. 17, 18). It was testified also (R. 17) that some Americans do import gold from London and that, without a license, they could buy gold in London and have it shipped to this country, whereupon the Government would purchase it on the basis of $35 an ounce, less a small deduction for charges. It was testified also that such person could not take the gold out of the custody of the Customs authority (R. 17).

On July 2, 1935, the Court (Brewster, J.), after hearing, denied the petitioner's motion for a finding for the petitioner on the law and the evidence, granted the motion of the debtor that the petition be dismissed (R. 97), and by final decree ordered that the claim of the petitioner be established "for an amount obtained by multiplying the number of ounces of pure gold, namely, 2015.13567 by

$20.67 per ounce" (R. 103, 104). From that decree the Holyoke Water Power Company appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decree of the District Court "as to the amount of the petitioner's claim" (R. 135), whereafter, on May 16, 1936, mandate issued to the District Court (R. 135). The petitioner thereupon brought to this Court its petition for certiorari, assigning as error, as hereinafter more particularly set forth, the affirming of the decree of the District Court as to the amount of the petitioner's claim and the decision that the rentals in question are to be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named in the indentures equals in gold coin of the weight and fineness of the years specified in each indenture.

Errors Intended to be Urged.

Your petitioner respectfully submits that the Circuit Court of Appeals erred—

1. In affirming the decree of the District Court as to the amount of the petitioner's claim (R. 135).

2. In holding that the rentals in these indentures may be discharged by the payment, "dollar by dollar," of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals (R. 134).

3. In holding, in substance, that a resolution by Congress providing that contracts for the delivery of a quantity of gold as a commodity, or, in the alternative, for the payment of the equivalent of this commodity in United States currency, may be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named therein equals in gold coin of a certain weight and fineness,

has a reasonable relation to the end which Congress had in view in passing the Joint Resolution (R. 132, 133).

4. In failing to hold that Congress, in the exercise of its power to regulate the currency, has interfered with contracts providing for the delivery of a quantity of gold as a commodity (if the Court was right in holding that such contracts are within the terms of the Joint Resolution) in violation of Article V and of Article X of the Amendments to the Constitution of the United States.

5. In holding (R. 130) that the rental provisions in these indentures are "gold value clauses" within the meaning of the decisions in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and *Nortz* v. *United States*, 294 U.S. 317.

6. In holding, in substance (R. 133, l. 2 *et seq.*), that the Joint Resolution provides that all obligations that are measured in terms of gold are payable dollar for dollar in any currency which is legal tender at the time of payment.

The Questions Involved.

I. Whether the Joint Resolution provides for the discharge "dollar for dollar" of that part of the obligation which provides for the payment of rent, at the option of the debtor, by the payment of a quantity of gold bullion.

II. What is the equivalent in currency, according to the intention of the parties, of the quantity of gold bullion specified in the typical rental provision?

III. Does the Joint Resolution, or any valid legislative or executive act, prohibit the discharge of the undertaking to pay the currency equivalent which was intended by the parties?

Resolution Involved.

Public Resolution No. 10 of the 73d Congress, passed on June 5, 1933, otherwise and herein referred to as the Joint Resolution, is set forth in Appendix A annexed to this brief.

Summary of Argument.

I.

The question for determination is the measure of the debtor's liability, on three certain dates after the devaluation of the dollar, under an obligation in the alternative, to pay either a specified quantity of gold as a commodity or its equivalent in currency, at the option of the debtor.

The provision for payment in gold was impossible of performance according to its terms, and no provision for its discharge other than according to its terms was provided by law (more particularly, by the Joint Resolution of June 5, 1933).

II.

The purpose of the parties in drawing the rental provisions in the form in dispute was to provide against the effect of an appreciation or depreciation of the currency by adopting gold bullion as a medium of payment, or, at the option of the lessee, as a measure of an indeterminate amount of currency according to the ratio of equivalence between gold bullion and currency on the various rental dates. According to the ordinary meaning of "equivalence," with respect to this relation, and as evident from various legislative enactments and executive acts, the currency equivalent of gold bullion on July 1 and October 1, 1934, and on January 1, 1935, according to the intent of the remaining alternative provision, was one dollar for each 15 5/21 grains of gold .9 fine, or $35 an ounce.

III.

The debtor's duty to perform this contractual provision according to its terms has not been modified by law (more particularly, by the said Joint Resolution), for the following reasons:

1. The provision of the Joint Resolution for the discharge of certain contracts "dollar for dollar" applies only to

obligations to pay sums certain in money. This is apparent from the terms of the Resolution itself, whether read by themselves or in connection with relevant external evidence of their meaning.

2. Even if the terms of the Resolution be equivocal in this respect, they are to be construed as not referring to contracts payable in money measured by gold as a commodity, because interference by Congress with such contracts would be subject to grave doubts as to its constitutionality. Contracts employing a commodity as a standard of value are not within the field of the currency power of Congress; although, even if they be within that field, they do not exist to such extent as to obstruct the monetary policy of Congress.

3. The obligation of the particular contracts in question may not be impaired as decreed by the Circuit Court of Appeals, for the additional reason that they provide for payment for the supply of the power of artificially impounded water which your petitioner is contractually bound to furnish, in fixed amounts, in perpetuity. Payment of the currency equivalent according to the intent of the undertakings will not constitute an unjust burden upon the debtor, and so will not create a dislocation of the domestic economy to any degree whatever. By the same token, the tendency of the result which it was the design of the Congress, in enacting the Joint Resolution, to produce, must be, if the decree be affirmed, inevitably to require the Water Power Company to perform that which is economically impossible.

For these reasons, interference with the performance of these indentures would deprive your petitioner of property and would bear no reasonable relation to any legitimate exercise of power by the Congress and would constitute violation of the Fifth and Tenth Amendments to the Constitution.

If the currency equivalent for which the petitioner contends may not be recovered, it is submitted that in no event should that equivalent be determined according to the decree of the Circuit Court of Appeals, but that the decree be modified so as not to preclude recovery by the petitioner according to the actual value of the water power furnished during the rental periods in question, and to be furnished in the future.

Argument.

Inasmuch as the obligation in question is framed in the alternative, that is, in providing for the payment of either a quantity of gold or its equivalent in currency, it is necessary to examine the extent of the debtor's duty under each alternative, since the debtor is presumably entitled to avail itself of the less onerous of these. The amount of the sums already paid and received on account of the rentals here in question is equally consistent with an intention on the part of the debtor to perform either of the alternatives, and no attempt has been made by either party to establish an election by the debtor to perform one rather than the other alternative. On the other hand, the fact that it has become impossible to perform the gold bullion provision according to its terms does not serve to narrow the scope of the inquiry as to the effect of the Joint Resolution in the premises, since the operation of that enactment was plainly —and indeed chiefly—intended to embrace contracts impossible of performance, except by virtue of its provision for discharge "dollar for dollar"; for example, contracts payable in gold coin, like that in issue in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240.

I. THE JOINT RESOLUTION DOES NOT PROVIDE FOR THE DISCHARGE OF THAT PART OF THE OBLIGATION IN QUESTION WHICH PROVIDES FOR THE PAYMENT OF RENT, AT THE OPTION OF THE DEBTOR, BY THE DELIVERY OF A QUANTITY OF GOLD BULLION.

This portion of the argument is confined to a consideration of the provision for the payment of rent by the delivery of—

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894 . . ."

This provision, which it is agreed is typical of all the indentures under which the rentals in question became payable, is found on page 22 of the Record.

A. The operation of the Resolution is confined by its terms to obligations "payable in money of the United States."

Subsection (b) of section 1 of the Resolution reads as follows:

> "the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Bearing in mind that we are here treating simply of the undertaking to deliver a quantity of gold, it is evident that this undertaking is unaffected, either by the declaration in the Resolution that certain contracts are against public policy, or by the provision contained therein that certain obligations be discharged "dollar for dollar." The

Resolution, so paraphrased as to embody the definition of "obligation" just quoted, would read, in its relevant portions:

> "Every provision contained in or made with respect to any obligation *payable in money of the United States* which purports to give the obligor a right to require payment in gold or a particular kind of coin or currency of the United States . . . is declared to be against public policy . . . Every obligation *payable in money of the United States* shall be discharged upon payment 'dollar for dollar' . . ."

We do not suppose that it will be seriously contended that the gold specified in the provision under consideration is "money of the United States."

The historic fact that gold has from time to time been the metallic base of the money of the United States has not the effect of constituting uncoined gold bullion "money." The terms of the express power given to Congress to "coin money" indicate the necessity of coinage to give to bullion the quality of legal tender attributed by the law, aside from its bullion value (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 304).

It seems, moreover, significant that the Chief Justice, in his opinion in that case, at page 302, took occasion to remark that the gold clauses before the Court "were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money."

It was suggested by Judge Brewster that it was evident from the debates in the Senate upon the Joint Resolution that "Congress was attempting to steer clear of constitutional difficulties by limiting the repudiation of gold clauses in public and private contracts to those calling for payment of gold as currency, and not as a commodity" (R. 107).

B. The terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars.

Aside from the clearly restrictive effect of the above-quoted definition of the term "obligation" as used in the Resolution, the terms of the provision for the discharge of certain money obligations "dollar for dollar" themselves necessarily restrict the operation of the Resolution to obligations payable in dollars. The phrase "dollar for dollar" is, by any meaning of the language, inappropriate and inapplicable to an obligation for the delivery of a quantity of gold bullion, or of any other commodity. That the quantity of bullion specified might with greater or less ease, and by arithmetical calculation, be compared with the gold content of a number of gold dollars, does not remove the inherent inapplicability of the phrase "dollar for dollar" and the consequent conclusion that, in employing that phrase, Congress did not contemplate the discharge of obligations other than such as might have a face amount in terms of dollars.

Nor is the question affected by the inclusion in the rental provision here involved of the words "fifteen hundred ($1500) dollars of the gold coin of the United States." It was plainly the function of this phrase simply to render the magnitude of the quantity of gold being stipulated for more readily comprehensible to the contracting parties. That function might be performed, in imaginable circumstances, by stating the quantity of gold by reference to that contained in a certain strong-box, or in a certain number of Spanish doubloons of the reign of Ferdinand and Isabella: clearly such an undertaking would not be an obligation "payable in money of the United States," and yet its essential intendment would be in no degree different from that of the contracts now before this Court. If the parties

had foregone the ready means of visual comprehension afforded by the reference to gold coins, and had calculated in the beginning (as must eventually have been done before payment in any case) the number of ounces or grains of gold being contracted for, and had written the stipulation in terms for "80.625 ounces of gold .9 fine, or 72.5625 ounces of gold 1000 fine," the substance of the undertaking would have been in no respect different.

We believe the correct result upon this branch of the case to have been reached by McLellan, J., in *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, 9 Fed. Supp. 451, at 453, in which he said:

> "The indentures contain no covenant to pay any definite sum of money. The number of dollars mentioned was the means of determining the amount of gold to be delivered or the amount of gold the equivalent whereof was to be paid in currency."

In *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 15 Fed. Supp. 938 (D.C. W.D. Mo. W.D.), decided September 19, 1936, the Court held that the Joint Resolution did not affect an obligation to pay "557.280 grains of pure unalloyed gold," saying (p. 941):

> "The Resolution applies to and affects only those obligations which are payable in money of the United States. Even if that were not the express language of the Resolution, the necessary implication from other language in the Resolution, as 'Every obligation . . . shall be discharged upon payment, dollar for dollar', etc., is that it applies to and affects only obligations which are payable in money of the United States . . . An obligation payable in fence posts or bushels of wheat or grains of gold is not payable in dollars so as to be included in the language 'discharged upon payment, dollar for dollar'."

The performance of the undertaking to pay gold bullion, if the debtor should so elect, admittedly is and was, on the dates when the rentals in question became due, impossible of performance according to its terms. It is submitted that the Joint Resolution has not the effect of requiring or permitting the discharge of that undertaking other than according to its terms. The measure of your petitioner's recovery in this case is therefore solely the debtor's duty under the alternative undertaking to pay the equivalent of the gold in currency.

II. The meaning of the term "equivalent" as used in the indentures.

It being evident that the provision for the payment of rent by the delivery of gold bullion is performable neither according to its terms nor in accordance with the provisions of the Joint Resolution, it remains solely to determine the extent of the debtor's obligation under the provision for the payment of the equivalent of the gold in currency. Before discussing the question of whether that provision may lawfully be discharged according to its terms (as of course your petitioner contends that it may and should be), it is important to determine exactly what those terms import; in other words, to inquire what it was that the parties to the indentures intended should be the equivalent in currency of the quantities of gold specified; and to that inquiry alone is this portion of the brief addressed.

A. Opinion of the Court Below.

It was stated as the opinion of the Circuit Court of Appeals that, if the Joint Resolution did not affect these indentures, "the equivalent in currency of the quantity of

gold named in these indentures for rentals would have to be determined in the devaluated dollar of 15 5/21 grains, which in the indenture under consideration would be $2539.69 at the rate of $31.50 per ounce for 80.625 ounces, nine tenths fine" (R. 129).

This ruling was not, of course, necessary to the decision, since the Joint Resolution was held to affect the contracts, but it is submitted to embody the correct view of the meaning of "equivalent," as between gold and paper currency.

B. The sense in which the parties must be taken to have employed the word "equivalent" in the indentures.

1. $1500 in devaluated paper currency would not constitute the full equivalent of the gold bullion specified in the typical indenture, according to the intention of the parties.

In the first place, it is submitted that the parties did not intend that, if the dollar should be devaluated, the currency alternative could be discharged by the payment of paper currency in an amount computed according to the ratio between gold and paper which had been abandoned. It was presumably the primary purpose of drafting the rental provision in the form now under discussion to provide for the effect of an appreciation or depreciation of the currency in circulation, in a manner similar to that adopted in the contract adjudicated upon in the case of *Ames* v. *Quimby*, 96 U.S. 324 (1877).

In this respect the contracts before this Court in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and in *Perry* v. *United States*, 294 U.S. 330, were akin in purpose, and although the obligation here in question called for payment in gold bullion, whereas the obligation in those two of the *Gold Clause Cases* was payable in gold coin, the decisions in those cases are decisive to the effect that, if the petitioner

in this case be given, as the equivalent in currency to which it is entitled under the indentures, a sum which is equivalent to the specified quantity of gold only at the ratio between gold and currency which has now been abandoned by Congress (or one dollar in currency for each 25.8 grains of gold .9 fine), that recovery will not constitute fulfilment of the contract according to the intention of the parties.

This meaning is clearly implicit in the statement on page 302 of the opinion in the Norman case that—

> "We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

Unless the amounts of currency which the Court believed were intended so to be secured to the creditors were nominally greater than the face amounts of the gold coin by which they were intended to be measured, there would clearly have been no occasion for considering the effect of the Joint Resolution in the premises; payment of the face amounts in currency would have constituted full payment according to the intention of the parties.

Again, in the concurring opinion of Mr. Justice Stone in the Perry case, at page 358:

> "I do not doubt that the gold clause in the Government bonds, like that in the private bonds just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause .... In the absence of any further exertion of governmental power, that obligation plainly could not be satisfied by payment of the same number of dollars, either specie or paper,

measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our economy at the due date."

And on page 360:

". . . it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery."

We believe, then, that it is patent that it was not intended that the equivalent in currency to which your petitioner should be entitled on each payment date should be unaffected by any devaluation of the dollar; or, in other words, that the full equivalent of the quantity of gold should be only that number of dollars which should be computed according to an abandoned standard of value.

2. *The conception of equivalence, as between gold bullion and gold coin, embodied in Stat. 1873, c. 131.*

Support for the converse or positive form of the proposition just discussed need not, we submit, rest in the realm of conjecture.

Act of 1873, c. 131, 17 Stat. 424, provided, in section 20 thereof—

"That any owner of gold bullion may deposit the same at any mint, to be formed into coin or bars for his benefit; . . ."

Section 14 provided:

"That the gold coin of the United States shall be a one dollar piece, which, at the standard weight of 25.8 grains, shall be the unit of value . . ."

Section 25 provided:

> "That the charge for converting standard gold bullion into coin shall be one-fifth of one percentum . . ."

The practice intended to be set up by these provisions was obviously that an owner of bullion might deposit it at the Mint to be formed into coin of 25.8 grains to each dollar, which should then be returned to him after the deduction of the small charge made for coinage. The return of the coins to the depositor was provided for in section 45 in the following terms:

> "That when the coins or bars which are the *equivalent* to any deposit of bullion are ready for delivery, they shall be paid to the depositor, or his order, by the superintendent . . ." (italics supplied).

The obvious fact that this equivalent was based upon the number of grains of gold which were contained in the standard unit of value at that time, together with the circumstance that no express definition of "equivalent" was included in the Act, is a clear indication that the meaning of the term rested upon common usage.

At any rate, in the absence of any evidence or indication that the parties had some other conception of equivalency in mind, in the making of these indentures in the years from 1881 to 1895, it is reasonable to suppose that the conception which was embodied in the Statute of 1873 was that which they intended to embody in the indentures. If this view be accepted, the intention was such that, on the dates of payment here concerned, which were all subsequent to the devaluation of the dollar, the equivalent of the bullion called for by these indentures was that number of gold coin dollars into which that bullion could have been coined; that is, just as, in 1873, or in 1881, or in 1895, when the statutory gold content of the dollar was 25.8 grains of gold

.9 fine, the equivalent of the bullion specified in the typical indenture was $1500 in gold coin, so after January 31, 1934, when the statutory gold content was changed to 15 5/21 grains of gold .9 fine, that equivalent became $2539.69 in gold coin of the new standard. The foregoing computation rests upon a conception of equivalence which is appropriate to a consideration of the currency alternative as providing for payment in gold coin.

There is no question, of course, that the equivalent in legal tender currency of a gold dollar of the new standard is one dollar in that currency, so that the result intended would be represented by the same amount, viz., $2539.69 thereof.

The term "currency" includes both coin, whether gold or subsidiary coin, and paper currency, or fiat money (see Webster's New International Dictionary, "currency").

3. The ordinary and usual meaning of equivalence, as between gold bullion and paper currency.

If the debtor should choose to commute the quantity of bullion directly into its equivalent in paper money, the ordinary meaning of equivalence as between gold and paper would lead to the same result. Upon this basis the Circuit Court of Appeals apparently rested its conclusion that, but for the Joint Resolution, the currency equivalent of the rentals would have to be determined in the devaluated dollar of 15 5/21 grains.

A brief review of the legal situation in regard to gold which obtained up to the time when these rentals became due will illustrate the meaning which both the legislative and executive branches of the Government have given to "equivalence" as between gold, whether coin or bullion, and currency, and which, it will become patent, is the usual and ordinary meaning.

Under date of August 28, 1933, an Executive Order (No. 6260 [12 U.S.C.A. sec. 95, note]) was issued by the President in accordance with the Act of March 9, 1933 (section 2 [12 U.S.C.A. sec. 95a]), which prescribed the conditions upon which gold coin and gold bullion could be obtained or held. On December 28, 1933, the Secretary of the Treasury, pursuant to the Act of March 9, 1933, "required every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion and gold certificates situated in the United States owned by such person," with certain exceptions not here pertinent. This Order of December 28, 1933, also provided that "the Secretary of the Treasury will pay for the gold coin, gold bullion and gold certificates [so delivered] an *equivalent* amount of any form of coin or currency coined or issued under the laws of the United States, designated by the Secretary of the Treasury" (italics supplied).

There was at that time no other expression of the amount to be paid for gold by the Treasury; to find the measure of equivalent, then, it is necessary to go beyond the terms of this order to some other measure with reference to which it must be interpreted. It can hardly be doubted that the currency equivalent of gold coin intended to be paid under the Order of December 28, 1933, was, at that time, the face amount thereof, and that the currency equivalent of pure gold bullion was $20.67 an ounce. The statutory gold content of the dollar was at that time 25.8 grains of gold .9 fine, which corresponds exactly to the price of $20.67 an ounce 1000 fine. Thus, at the time of the making of the Order of December 28, 1933, there existed a definite and independent standard of equivalency between currency and gold, with relation to which that order was to be and could be easily interpreted. Later enactments and orders confirm the conclusion that this measure must have been understood to be the statutory gold content of the dollar.

On January 15, 1934, the Secretary of the Treasury fixed January 17th as the last day for the delivery of gold under his Order of December 28, 1933, and also prescribed that after that date there should be paid for gold turned in—

> "*only such part or none* of the amount otherwise payable therefor as the Secretary of the Treasury may from time to time prescribe and the whole or any balance shall be retained and applied to the penalty for the failure to comply with the requirements of such Order and of this Order. The acceptance of any such coin, bullion, or certificates after January 17, 1934, whether or not a part or all of the amount otherwise payable therefor is so retained, shall be without prejudice to the right to collect by suit or otherwise the full penalty provided for in section 11(n) of the Federal Reserve Act, as amended, less such portion of the penalty as may have been retained as hereinbefore provided" (italics supplied) (R. 82).

On January 17th, the last day of the period of grace thus fixed, the Secretary of the Treasury altered his previous order under which the full equivalent was to be paid for gold turned in under the Order of December 28, 1933, by prescribing that, subject to the rights reserved in his Order of January 15, 1934, as above set forth, there should be paid for gold delivered thereafter, "for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion $20.67 an ounce" (R. 82, 83). This amount was still the statutory equivalent of an ounce of gold bullion, to be sure, but it was not long to remain so, as the dollar was devalued just two weeks later, when the equivalent of a dollar became, by the President's Proclamation of January 31, 1934 (R. 37), and the express definition contained in section 15 of the Gold Reserve Act of 1934 (R. 72), 15 5/21 grains of gold .9 fine, or $35 per ounce of pure

gold. It seems clear that, if the measure of the maximum price to be paid for illegally held gold bullion had continued to be its "equivalent," as provided in the Order of December 28, 1933, the automatic effect of the devaluation of the dollar would have been to raise that price to $35 an ounce, and that this change in the phraseology of the Treasury Orders relating to the amount of currency to be paid for gold was made in anticipation of the devaluation of the dollar, and in order to prevent such effect of that devaluation as would have set the new statutory equivalent of gold as the maximum amount to be paid by the Treasury under the Orders of December 28, 1933, and January 15, 1934.

The express definition of "equivalent" contained in section 15 of the Gold Reserve Act of 1934, just referred to, is as follows:

> "Wherever reference is made in this Act to *equivalents as between dollars or currency of the United States and gold,* one dollar or one dollar face amount of any currency of the United States equals such a number of grains of gold, nine-tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight-tenths grains of gold, nine-tenths fine, *and thereafter such a number of grains of gold, nine-tenths fine, as the President shall have fixed under such authority*" (R. 72) (italics supplied).

The same definition, made applicable to the Provisional Regulations issued under the Gold Reserve Act by the Secretary of the Treasury on January 30 and 31, 1934, is

found in section 4 of article I of those Regulations (R. 41), which was approved on January 30th (R. 61).

4. *An alternative measure of equivalence between gold bullion and currency which may be found to have been adopted by the parties is that amount of currency which the gold bullion should be worth in a free market.*

In the years 1881 to 1897, when these indentures were made, there was no legal restriction upon the possession of or dealing in gold in this country, and the parties may reasonably be presumed to have contemplated, as did the parties to the contract in *Ames* v. *Quimby*, 96 U.S. 324 (1877), that the value of gold in terms of money would continue to bear a relation to general prices of which the value of gold would be a convenient index. Although no free market for gold bullion in this country was open to this petitioner in 1934 or 1935 (in the absence of a license from the Secretary of the Treasury), this circumstance is immaterial so long as there did exist a market which reflected the value of gold in terms of the currency, as evidenced by dealings in gold to an enormous amount. This market was that which existed at the Mints, which, under section 42 of the Provisional Regulations issued under the Gold Reserve Act of 1934 (R. 59), paid for all gold purchased by them in accordance with Article VI of the Regulations $35 (less one-fourth of 1%) per troy ounce of fine gold and which, under section 44 of those Regulations (R. 60), charged for all gold sold under the same article $35 (plus one-fourth of 1%) per troy ounce of fine gold.

This price at the Mints represents the figure which the Treasury apparently found it necessary to pay in the new devaluated currency in order to attract gold to the Treasury, as well as the price below which the Treasury was unwilling to part with its gold. It is not necessary to show what the

relation between this mint price of gold and general prices is or was in 1934 and 1935. In *Ames* v. *Quimby, supra,* it was held that it was not necessary, in order to vary the originally stipulated price of the shovel-handles, that a change in the price of gold should have affected the general price of merchandise (see *id.* p. 327). If gold should advance more than 25% in price, that was itself, without proof of general prices, to work a change in the price of the goods. So in the present case, in which no mention was made in the indentures of general or other prices, the parties may be taken to have submitted the amount of the consideration, as a practical matter, to the value of gold, *as that value might appear in a market in which the price should represent the amount at which a willing purchaser would be willing to buy and a seller under no compulsion should be willing to sell.* Confirmation of the former price as representative of the value of gold in a free market is supplied by the fact that the world price of gold was on the dates of payment substantially the same (R. 18).

It is submitted, therefore, that the parties to the indentures should be found to have conceived of the relation of "equivalence" as resting upon either the relation between gold bullion and gold coin established by statute, or the relation between gold bullion and the currency in general likewise to be established by statute, or the value of gold in a free market in this country. Whether their intention be found to have embraced any one of these alternatives, or all three, is immaterial, since the result in this case is the same.

C. The measure of equivalence contended for by the debtor is contrary to the intention of the parties.

It has been maintained by the debtor that the currency equivalent is to be determined upon the same basis as

would be damages for the failure to perform an enforceable obligation to deliver the specified quantity of gold, and that those damages are no more than $20.67 an ounce. In so far as this contention represents simply an assertion that the law requires the equivalent so to be measured in this case, regardless of the intention of the parties, it will be dealt with hereinafter; the present inquiry is directed solely to the discovery of what must have been the intention of the parties in the premises.

From this point of view it is clearly evident that the measure of equivalency which is proposed by the debtor cannot be supported by any intention which the parties may reasonably be supposed to have entertained. It cannot be supposed that the parties intended, if the Government should constitute the possession of gold illegal, and should order the delivery up to the Treasury of all except certain exempted gold, upon the payment of an amount of money which had been the equivalent thereof when gold might legally be held, or of *such part or none* of that amount as the Secretary of the Treasury might prescribe (see Order of January 15, 1934, R. 82), that the amount which should constitute, under the contracts, the equivalent of the gold thus rendered impossible of delivery should depend upon the amount so to be fixed by the Secretary of the Treasury. This amount might, in easily imaginable circumstances,* be reduced to nothing at all; but whatever it might be, it could not be said to represent a determina-

* With the passage of time beyond January 17, 1934 (which was the date of expiration of the period of grace for the delivery of all except exempted gold set by the Order of the Secretary of the Treasury of January 15, 1934, R. 82), it becomes less and less unlikely that the Secretary of the Treasury might carry out the ominous intimation in his Order of January 15, 1934, and allow nothing for gold theretofore wrongfully held, except perhaps a remission of the other penalties for its wrongful acquisition or detention by law provided.

tion of equivalent according to any criterion of measurement which was in existence at the time the contracts were made, or which the parties may be supposed to have contemplated.

D. The measure of equivalence adopted by the Courts below.

Notwithstanding the foregoing considerations, however, the amount which was "obtainable from the government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by executive order" for gold held in non-compliance with the previous Order to deliver up gold to the Treasury, was fixed upon by McLellan, J., in the previous case of *Holyoke Water Power Company* v. *American Writing Paper Company, Inc.*, reported in 9 Fed. Supp. 451, as the measure of your petitioner's recovery, and that opinion was adopted by Brewster, J., in the present case (R. 106, 110). Neither of those Courts, however, apparently concerned itself with the determination of what the parties had stipulated for under the obligation to pay the currency equivalent. Judge McLellan, although he assumed that the only obligation the measure of which it was necessary to determine was that which was payable in currency (9 Fed. Supp. at 453), at the same time stated (*id.* p. 454) that—

> "the burden of proof is upon the plaintiff to establish its damages, and the only relevant evidence submitted as to the market price of gold was the price obtainable from the government on January 2, 1934, when by implication the price was fixed at $20.67 an ounce, or on January 17, 1934, when the price was expressly so determined by Executive Order."

Whether or not recovery of a sum of money upon breach of a promise to pay the same constitutes recovery of damages or specific performance, it is sufficient to remark that the plaintiff in such an action is under no burden to establish his damages other than by establishing the amount of money stipulated for and the extent to which it has not been paid. Although the case before Judge McLellan involved rentals which had become payable when the statutory equivalent between gold and currency was still $1 for every 25.8 grains of gold .9 fine, Judge Brewster adopted the reasoning of that opinion, upon the theory that he was bound by it, as decisive of your petitioner's rights to the payments in this case, although the latter did not become due until after the devaluation of the dollar (R. 106-111), and although there was, on the dates when they became due, a market in this country (viz., at the Mints) at which gold was bought and sold for $35 an ounce (R. 17).

The Circuit Court of Appeals apparently recognized that the currency equivalent of the gold was, on the payment dates here in question, $1 for every 15 5/21 grains .9 fine (R. 129), although that Court was of opinion that, by force of law, your petitioner might not recover an amount so calculated (R. 134).

It is sufficient to the purposes of this portion of your petitioner's argument that it appear that the currency equivalent stipulated for is the total of those sums which, on the dates of payment, represented amounts of dollars to the number of times that 15 5/21 grains is contained in the quantities of gold .9 fine, or $35 for each ounce of fine gold, called for by the indentures. If the petitioner has demonstrated that the equivalents were intended to be calculated upon this basis, it follows from elementary principles of the law of contracts that your petitioner should

recover the difference (together with interest thereon) between the amounts so calculated and the amounts already paid, unless it can be shown that some valid legislative action prevents that recovery. That no valid legislation has the effect of preventing recovery upon this basis is the subject of the remaining portion of the brief.

III. NEITHER THE JOINT RESOLUTION NOR ANY OTHER VALID LEGISLATIVE OR EXECUTIVE ACT HAS THE EFFECT OF PROHIBITING THE DISCHARGE OF THE UNDERTAKING TO PAY THE EQUIVALENT OF THE GOLD IN CURRENCY, ACCORDING TO THE TERMS OF THAT UNDERTAKING.

It is recognized that the provision for the discharge of obligations "dollar for dollar" applies to all contracts for the payment of money, whether or not made in terms of a particular kind of coin or currency. In this respect the Resolution would embrace this debtor's obligation to pay the currency equivalent, upon the determination of the amount of that equivalent; the question upon the present branch of the case, however, is whether the Resolution is to be so applied as to affect the determination of that equivalent in violation of the intention of the parties to the contract.

A. The essential error in the decision of the Circuit Court of Appeals.

That the fundamental inquiry in this case is the measure of the debtor's liability under its undertaking to pay the currency equivalent of the gold called for was recognized by the Circuit Court of Appeals (R. 125), which apparently assumed without discussion that the provisions of the Joint Resolution for discharge "dollar for dollar" did not resuscitate the bullion alternative from the state of impossibility of performance created by the law. That Court

then, however, committed what is respectfully submitted to have been error, in not holding that the sole effect of the Joint Resolution was to provide that the equivalent in currency called for by the provision, when computed, should be discharged "dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts"; instead, it reached a result which can be explained only in one of two ways, viz.:

(1) The Circuit Court of Appeals applied the Joint Resolution, not to the provision for the payment of the currency equivalent, but to the statement of the number of dollars of gold coin used in describing the required quantity of bullion; or

(2) It applied the Joint Resolution, not to any provision of the contract which had a face value, for there was no such provision, but to the *process of determining* the face value of the currency provision, and this, not according to the intention of the parties, but according to the supposed effect of legislative and executive action.

(1) To apply the Resolution to the number of dollars of gold coin, stated as the measure of the quantity of gold, is to confuse this case with that of an undertaking to pay gold coin or its equivalent in currency. The undoubted effect of the application of the Resolution to an undertaking of the latter sort is to render performance of the currency portion of the contract nugatory, and to make dischargeable, in currency and at its face value, the obligation to pay a certain number of dollars in gold coin which would otherwise have been impossible of performance. Thus understood, it is plain that no analogy between such a case and the present case can support the effect given the Resolution by the Court below. There was no obligation to pay gold coin, and to apply the Resolution to the number of dollars of coin stated as the measure of the quantity of gold is in effect to discharge according to a complete misconception

of the Resolution that part of the obligation which we have above demonstrated is not within its purview.

(2) If the Circuit Court of Appeals applied the Joint Resolution so as to determine the "equivalent" called for by the contract, this was, it is submitted, likewise unwarranted. The operation of the Resolution upon such gold value contracts as are within its provisions is, as we have shown, such as to render nugatory the provision, express or implied, for the payment of a currency equivalent; that is, there is no provision in the Resolution which purports to dictate the process by which such an equivalent shall be determined.

It is submitted that the result of the decision of the Circuit Court of Appeals is to require discharge of the alternative provision for the delivery of gold bullion, although that provision was impossible of performance according to its terms, and was not made dischargeable "dollar for dollar" by force of the Joint Resolution, and although that Court appeared to assume that that part of the contract was not in question and was not affected by the Resolution. This the decision effects, while purporting to adjudicate solely the measure of liability under the obligation to pay the currency equivalent, the amount of which it conceded (R. 133) to be that for which your petitioner contends.

B. The plain meaning of the terms of the Joint Resolution does not provide for its application to a provision for the payment of a sum of money to be measured by a quantity of gold bullion until the amount of money has been determined.

In interpreting the Joint Resolution, apparently a rule of strict construction should apply, that is, the enactment should be given no broader scope than is required by the plain meaning of its terms: See *Lane County* v. *Oregon*,

7 Wall. 71 (1868), at 79. See also *Bronson* v. *Rodes*, 7 Wall. 229 (1868), at 254.

1. Obligations "payable in money of the United States."

As we have hereinbefore demonstrated (I, A), the effect of the definition of "obligation" which is contained in subsection (b) of section 1 of the Resolution itself is such as to exempt from the operation of the Resolution a simple obligation for the payment of a quantity of gold stipulated for as a commodity.

It is thus apparent that the word "gold," as it is used in the first sentence of section 1 of the Resolution, is to be construed as meaning "gold coin," and that therefore the words "or in an amount in money of the United States measured thereby" are to be construed, with respect to the reference to "gold," as meaning "or in an amount in money of the United States measured by gold coin."

This seems to have been the interpretation which is implicit in the statement contained on page 368 of the dissenting opinion of Mr. Justice McReynolds in the Norman case:

> "On June 5, 1933, Congress passed a 'Joint Resolution *to assure uniform value to the coins and currencies* of the United States'. 48 Stat., c. 48, p. 112. This recited that holding and dealing in gold affect the public interest and are therefore subject to regulation; that the provisions of obligations which purport to give the obligee the right to require payment in *gold coin or in any amount of money of the United States measured thereby* obstruct the power of Congress to regulate the value of money and are inconsistent with the policy to maintain the equal value of every dollar coined or issued" (italics supplied).

This interpretation of the Resolution, it is submitted, is not only the necessary result of the limitation contained in the definition of "obligation," but is in accord with the usual and ordinary meaning of the word "gold" when used with reference to payment of money; in other words, the ordinary meaning of such a phrase as "to be paid in gold" is "to be paid in gold coin." This is a natural result of the fact that, since the decision in *Bronson* v. *Rodes,* in 1868, virtually all obligations calling for payment in gold have provided in one form or another for payment in gold coin.

(There is, of course, no room or occasion for such a construction of the word "gold" where it is expressly provided by the parties, as in the indentures in the present case, that it is gold as a commodity which is stipulated.)

2. Restrictive effect of the phrase "dollar for dollar."

The words "dollar for dollar" contained in the provision for the discharge of certain contracts necessarily have the effect of exempting from the destructive operation of the Resolution contracts payable in an amount in money measured by gold as a commodity.

The effect upon an obligation payable in an amount in money measured by gold coin which was obviously intended to be created by that provision for discharge was to render nugatory the alternative obligation to pay a perhaps increased amount of money and to permit discharge of the obligation by the payment of as many dollars in other currency as the dollars in gold coin specified. In no other way within the meaning of the language used could the provision for discharge be applied to such a contract so as to achieve the result intended by Congress. Such a contract was, in other words, to be treated as if it contained no provision for the payment of an amount in other currency, and as if it were simply a contract for payment in gold coin. If a "gold

value'' clause were either express or implied, the obligation was nevertheless to be discharged by payment in any currency of the number of dollars of gold coin. Thus understood, the Resolution is again seen to be inapplicable to an obligation to pay an indeterminate sum of money measured by gold as a commodity.

3. The currency equivalent is not to be measured by gold coin.

A part of the argument for the debtor appears to contend, and the decision of the Circuit Court of Appeals appears to hold, that, even if the Joint Resolution does not affect the discharge of an obligation to pay an amount in money measured simply by gold bullion, nevertheless, in this case, the amount of currency is measured by gold coin, though only mediately, through its translation into terms of an amount of uncoined gold.

This position relies upon the fortuitous circumstance that an amount of gold coin was referred to in the indentures, but ignores the function to which that reference was clearly limited. That function was the description, once and for all, of the amount of gold bullion which was the subject of the first alternative obligation; it was not inserted as a measure of value, and consequently it was not to serve as a standard with relation to which the fluctuating value of currency should thereafter, from time to time, be determined. An obligation to deliver an amount in money measured by gold coin, in the sense of a ''gold value'' clause, states the gold coin as a measure of the value of the currency equivalent to be paid; whereas the coin in the provision under consideration is stated solely as a measure of quantity.

The fallacy in the debtor's position becomes evident if we suppose an obligation like that in question in every re-

spect except that the quantity of gold be expressed in grains rather than with reference to a number of coins. It could not be contended that such a contract called for an amount in money measured by gold coin; yet the contract here in question is of precisely the same effect.

4. This Court has not decided that an obligation to pay an amount in money measured by gold bullion is within the terms of the Joint Resolution.

Enough has been said to show that there is nothing in the decision of this Court in *Norman* v. *B. & O. R.R. Co.* which runs counter to the conclusion that the terms themselves of the Joint Resolution are not susceptible of application in the manner in which they were applied by the Circuit Court of Appeals.

As the Chief Justice remarked (at page 302 of his opinion), the gold clauses before the Court "were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars." Your petitioner, reading the foregoing remark in connection with the Court's decision that the clauses are "still hostile to the policy of the Congress and hence subject to prohibition" if treated as "gold value" clauses, has interpreted the Court's remarks as having been intentionally restricted to the case before the Court, and as having implied in no degree that an obligation, express or implied, to pay the value of gold as a commodity is likewise either within the terms of the Resolution or hostile to the policy of the Congress.

C. If, looking solely at the face of the Resolution, there be doubt whether or not its terms affect an obligation to pay the currency equivalent of a quantity of gold bullion, that doubt is removed by reference to relevant evidence beyond the corners of the act.

1. It was the sense of the debates in Congress preceding the passage of the Resolution that it was the purpose of Congress to relieve a vast number of debtors from the burden of interest-bearing obligations, in the nature of bonds and other securities, requiring them to repay, in gold coin or in amounts of money measured by gold coin, money theretofore lent to them, in so far as that burden might be greater by reason of the stipulation for gold coin.

One of the subsidiary purposes was, by removing the advantage of gold coin obligations over obligations payable in money generally, to enable the Government to borrow more money. It is submitted that the debates abundantly show that Congress gave no attention to the existence of obligations written in terms of gold as a commodity, but that, on the contrary, in so far as the question of the power of Congress to interfere with such contracts was considered by them, they intended to avoid that question.

The following extracts from the debates, which, it is submitted, are typical, are quoted as reflecting light on the general purpose of Congress and the evil which it sought to remedy by the enactment of the Joint Resolution of June 5, 1933. See *Humphrey's Executor* v. *United States,* 295 U.S. 602, at 625 (1934).

Upon being questioned by Senator Gore as to the right of the Government to take property without just compensation, Senator Borah replied:

> "That, in my judgment, has no relevancy to the subject which we are now discussing. We are discussing

contracts to pay money, to pay dollars, and Congress may compel a person to accept a dollar of a different gold content in satisfaction of a dollar of a certain gold content. A dollar is a dollar under the decree of the Government, whether it has one gold content or another. Let us keep away from commodity contracts. They throw no light on the issue here" (77 Cong. Rec. 5000).

That the subject being considered was the existence of the gold clause in obligations to repay loans of money is indicated by the following:

"Mr. Vandenberg. Was there a proposal in the committee to limit this proposition [the Joint Resolution] to new loans and not to apply it to existing contracts?

"Mr. Fletcher. There was" (77 Cong. Rec. 4988).

Upon being questioned as to the necessity for making the Resolution retroactive, Senator Fletcher replied:

". . . The situation cannot be met merely by enabling new obligations to be payable in legal tender without creating a difference in value between the old and the new obligations and impairing or destroying the market for new obligations. Investors would no doubt prefer private obligations with a gold clause to Government obligations payable in currency. In other words, we cannot make a distinction. The moment bonds or certificates or notes are offered to the public payable in legal tender, with outstanding obligations of the Government payable in gold, it will be seen that investors would rush to the gold obligations and call for that sort of security and would not take the new certificates or the new debentures or the new bonds or the new obligations. It will interfere both with finance-

ing of the Government and financing of private enterprise" (77 Cong. Rec. 4988).

"Mr. Parsons. Certainly the money changers have no right to exact from the toil of the masses a rate of interest and a principle [*sic*] of bond in a kind of money different from that which is paid to labor" (77 Cong. Rec. 4598).

"Mr. Shallenberger. Every American dollar henceforth shall have the power to discharge the debtor from his bond, and that is the power in this respect that sets us free, governments and private citizens alike. . . . Mortgages and bonds are outstanding today in the amount of more than one hundred billions which are payable in gold. . . ." (77 Cong. Rec. 4599).

In answer to questions by Senator Reed as to whether the Joint Resolution would not leave the country half off the gold standard, and, as to gold certificates, half on the gold standard, Mr. Fletcher replied:

". . . this joint resolution deals with interest-bearing obligations. It does not disturb the base of the currency, as far as that item is concerned" (77 Cong. Rec. 5020).

"Mr. Steagall. I want to ask who in this country paid in gold when they contracted with the Government or with individuals for the obligations that are made dischargeable in gold? People who bought our bonds during the war paid for them with bank credits. They paid with bank checks. People who bought our bonds and who have purchased this stupendous amount of obligations in this country did not pay for them in gold. They did not even pay for them in currency of any kind. They paid for them in bank checks."

2. The Report of the Committee on Banking and Currency may be referred to to explain the meaning of the Resolution. *Lapina* v. *Williams*, 232 U.S. 78, at 90.

As quoted in the Norman case, 294 U.S. at p. 312, this report remarked upon the two phenomena which made the enforcement of the "gold clauses" incompatible with the public interest:

> "The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the present emergency. These gold clauses render ineffective the power of the Government to create a currency and determine the value thereof. If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of *securities* are expressed in a *particular form of the circulating medium*, particularly when it is the medium upon which the entire credit and currency structure rests" (italics supplied).

The reasoning of the Report, together with the particular language above emphasized, show that it was existence of securities, that is, obligations representing sums certain

payable in money of the United States, and written in terms of gold coin, both as a medium of payment and as a standard of value, with which it was the design of Congress, in passing the Resolution, to deal.

D. Congress has no power to affect the discharge, according to its terms, of an undertaking to pay an amount in money measured by gold as a commodity.

Your petitioner does in no respect relax in its contention that the terms of the Joint Resolution, whether read by themselves or in connection with the report of the Committee on Banking and Currency and the debates in Congress, are sufficient to show that Congress had no intention, in enacting the Resolution, of interfering with contracts written in terms of commodities. If, however, those terms appear to this Court to be equivocal, your petitioner submits that, since they are at least susceptible of such a construction as that for which your petitioner contends, this Court should adopt that construction in order to avoid the unconstitutional result of confirming the broad effect of the Resolution given by the decision of the Circuit Court of Appeals.

1. The adoption by private parties of a commodity standard of value is not within the field of the power of Congress to regulate the value of money.

It was the result of *Bronson* v. *Rodes,* 7 Wall. 229 (1868), and *Trebilcock* v. *Wilson,* 12 Wall. 687 (1871), that the Legal Tender Acts of 1862 and 1863 did not have the effect of interfering with the contracts of private parties in so far as they had adopted, as a standard of value, a particular kind of coin. As the Chief Justice stated in the Norman case, however—

> "The Court did not decide that the congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way of the execution of the policy of the congress in relation to the currency."

It has now been decided by this Court that Congress may in certain circumstances, and not improperly did in the circumstances existing on June 5, 1933, render nugatory the adoption by private parties of *gold coin* of a particular standard of weight and fineness as a standard of value for the determination of their mutual rights and liabilities (*Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240). Such contracts have a congenital infirmity by reason of the fact that they "deal with a subject matter which lies within the control of congress" (*id.* pp. 307, 308). The subject-matter which was in that case decided to be within the domain of Congress by virtue of its constitutional authority to regulate the currency was *money as a standard of value*. As the Chief Justice said in the Norman case (p. 316):

> "The Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority."

The parties to the private bonds adjudicated upon in that case had attempted to establish as between themselves a monetary system which was based upon a gold dollar which has been abandoned by the President, under the delegated authority of Congress. To allow that private monetary system to stand would have been to permit the existence, to the extent of such obligations, of a monetary system related to a kind of dollar, other than that established under authority of Congress as the sole monetary standard of value, and this in the face of the exercise of the power of Congress to destroy such a system.

The parties to those bonds had not, however, adopted, and the Court did not decide that they might not adopt, some private standard other than a monetary unit for the measurement of their mutual rights and liabilities, without bringing their undertakings within the field of federal legislation. That field, with relation to the power over the currency, is confined to the declaration of "what shall be money" and to the regulation of its value (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 303).

It is respectfully submitted that, if the parties to a contract employ as a standard of value in a contract payable in money, not a dollar of any standard of weight and fineness, not a unit of money of the United States of any period or kind, but a non-monetary unit such as, for instance, one thousand bushels of wheat, or a consolidated index of the prices of certain named commodities, or a specified quantity of gold, that standard of value, being non-monetary, is not of the subject-matter of the power of Congress over money, and should therefore be held inviolate against any attempted interference with its operation. Congress may, it is established, provide for a new means in which such an obligation may be paid, whether the money in which it was provided to be paid was gold coin or some other particular kind of coin or currency, or in money generally; this much would be an exercise of the power of Congress to provide what money shall be the *medium of payment*. Congress may in addition, in the exercise of its power over money *as a standard of value*, provide, at least within certain limits, what the relation of that which it shall declare to be the monetary standard of value shall be to the currency which is legal tender.

The present question, however, is whether Congress has a further power, that is, the power not only to regulate the medium of payment of contracts payable in money, and to provide the relation of the monetary standard to the cur-

rency, but to provide that parties may not effectually as between themselves adopt some standard other than this monetary one. That Congress has not yet attempted to interfere with such adoptions of a commodity standard of value, unless it be held to have done so by the Joint Resolution with relation to gold as a commodity, there can be no question; a contract to pay an amount in money measured by a specified amount of wheat or of iron, or by a consolidated price index, would be unquestionably outside the terms of the Joint Resolution except in so far as the *medium of payment* might be altered.

It is submitted that the power to regulate the currency is adequately founded upon the power to dictate what the standard monetary unit of value shall be from time to time, and to protect and maintain, within perhaps certain limits, the stability of the relation between that unit and commodities in general. It is at least seriously questionable, however, that it is proper for the Congress, not only to act within this field, but to go further and to interfere with private arrangements based upon standards of value which are not monetary, and which must in their nature therefore be subject to the inconveniences, uncertainties and disabilities peculiar to their particular subject-matter. A contract payable in an amount of money to be measured by a commodity is uncertain as to amount and is undoubtedly therefore non-negotiable. Moreover, the determination of that amount must involve some, and perhaps a considerable amount of, clerical labor and even research. The value of any particular commodity is subject to fluctuations which are only partially affected by changes in the value of money generally with respect to the general level of all prices. It is presumably for this latter characteristic that they have been employed even to the small extent that they have been employed. It is evident, therefore, that the parties to such a contract have, in foregoing the em-

ployment of a monetary standard for the determination of their mutual rights, created an obligation of essentially different characteristics from a contract of which the subject-matter is a monetary standard of value. In the opinion in *Ames* v. *Quimby*, 96 U.S. 324 (1877), the Court upheld a contract which employed gold as a commodity as a standard of value, without any intimation that a consideration of the subject necessitated any comparison with gold coin contracts or reference to the leading case of *Bronson* v. *Rodes*, which, if the debtor's position here were correct, would have been regarded as at least relevant to the discussion.

2. *Even if the contractual adoption of a non-monetary standard of value is not per se beyond the domain of the currency power of Congress, it may be seriously doubted whether interference with such an adoption would, on June 5, 1933, have had a reasonable relation to the end which Congress then had in view.*

The Circuit Court of Appeals (R. 132) appeared to concede that contracts of the type in question here "might interfere with the constitutional power to regulate currency in a much lesser degree than the gold clause in corporate bonds or in gold certificates," but stated that "Congress has made no exception of unusual contracts, such as these indentures, which alone may have only slight effect on the constitutional power to regulate the currency of the country." That Court then held that it could make no exception of such contracts from the operation of the Joint Resolution, because Congress had made none. It is respectfully suggested, nevertheless, that the exception which it is here sought to establish by virtue of the commodity nature of the contracts may be found to have been provided by Congress by virtue of the limitation of the Resolution by

its terms to obligations "payable in money of the United States." We submit that we have demonstrated that the effect of this limitation may be found to dictate that construction of the word "gold," as used in the Resolution, which would confine the interference of the Resolution with contractual standards of value, as distinguished from the media of payment, to the adoption, as standards of value, of units of coin or currency.

Neither the existence of a large number of obligations calling for payment in gold coin nor the occasion for the exercise of the undoubted power of the Congress "to endeavor to conserve the gold resources of the Treasury, to insure its command of gold in order to protect and increase its resources, and to prohibit the exportation of gold coin for its use for any purpose inconsistent with the needs of the Treasury" (Norman case, 294 U.S. at 313) has any relation, it is submitted, to obligations payable in any kind of currency, such as are at this point under discussion. Since the payment of such contracts does not require the use of gold, they constitute no danger to the Treasury's command of that metal.

Moreover, the reason which this Court stated to justify modification of the "gold clauses" in issue in the *Railroad Bond Cases* if treated as "gold value" clauses, are not applicable to contracts for the payment of an amount of money measured by gold as a commodity, for the reason that contracts payable in an amount of money measured by a commodity do not exist to an appreciable extent. Of this fact there is no direct proof in this case. It is submitted, however, that it is a circumstance of which this Court may take judicial notice. The report of the Committee on Banking and Currency of the House of Representatives recommending favorable action upon the Joint Resolution (H.R. Rep. No. 169, 73d Cong. 1st Sess.) contained the statement:

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country *virtually all obligations,* almost as a matter of routine contain the gold clause, . . . Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a *particular form of the circulating medium* . . ." (italics supplied).

That this report is to be read as dealing with interest bearing securities payable in gold coin is clearly inferable from its terms, and that this Court so understood the report appears from the following language of the Chief Justice in the Norman case, at page 313:

> "The estimates submitted at the bar indicate that when the Joint Resolution was adopted there were outstanding seventy-five billion dollars or more of such obligations, the annual interest charges on which probably amounted to between three and four billion dollars. It is apparent that if these promises were to be taken literally as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin."

It is respectfully submitted that the effect of the decree of the Circuit Court of Appeals is to strike down the express contracts for payment of the full equivalent of the gold bullion in return for the use of the petitioner's property (see *Norman* v. *B. & O. R.R. Co.,* 294 U.S. at 307; *Atty. General* v. *Old Colony R.R.,* 160 Mass. 62 (1893)),

and that, since these contracts have not the congenital infirmity inherent in contracts dealing with the value of the monetary unit (see Norman case, *id.* at pp. 307 and 308), such interference therewith is a deprivation of its property without due process of law in contravention of the 5th Amendment to the Constitution (see *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1922)), and since, in any case, these contracts constitute no interference whatever with any legitimate exercise of power by Congress, the effect given by the decree of the Circuit Court of Appeals to the Joint Resolution and other legislation of Congress is in contravention of the 10th Amendment to the Constitution.

Even if your petitioner has failed to show that an application of the Joint Resolution which would interfere with obligations payable in money measured by gold as a commodity would be unconstitutional, it is submitted that there is at least a grave doubt as to whether such interference would be constitutional, and that therefore this Court should adopt that construction which will avoid such doubt.

See *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, at 407 (1908);
United States v. *LaFranca,* 282 U.S. 568, at 574 (1930).

Even if this Court should be of opinion that no grave doubt exists as to the constitutionality of including, within the operation of the Joint Resolution, contracts payable in money measured by gold as a commodity, it is submitted that, since the Resolution may (as the petitioner contends that it should) be construed so as not to include such contracts, it should be so construed in order to avoid giving any greater effect to the Resolution than is clearly required by its terms (see *Lane County* v. *Oregon,* 7 Wall. 71 (1868), at 79), especially where such contracts constitute no interference with the monetary policy of Congress.

E. The Joint Resolution, if so applied as to permit the discharge of these contracts under the decree of the Court below, bears no reasonable relation to the exercise of the powers of Congress over the currency, by reason of the perpetually executory nature of these contracts, and therefore would contravene the Fifth and Tenth Amendments to the Constitution.

We have attempted to demonstrate the inviolability of the obligations here in question which inheres in their nature as dealing with a commodity standard of value. If there seems to this Court to be even a grave doubt upon that score, the decree of the Court below should be modified so as to permit the discharge of these obligations according to their terms. If it seems to the Court that there is no such doubt, it is further urged that these obligations are inviolable by reason of additional characteristics which, it is submitted, remove them from the sphere of federal control. Your petitioner asks this Court to decide that a federal interference which may be valid as applied to contracts for the repayment of money lent, even if the amount of money be measured by gold as a commodity, should nevertheless be held invalid if applied to one side of a bilaterally executory contract for the maintaining of a dam, canals and other works to provide water power in perpetuity for a stipulated rental, such as the contracts here involved (R. 26, 27).

Presumably, the validity of the enactment as applied to contracts of this type may be judged apart from its validity with reference to the different facts involved in the case of *Norman* v. *B. & O. R.R. Co.* *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, at 289; *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, at 415; *Perry* v. *United States*, 294 U.S. 330.

Although water power is technically in the nature of real estate, an undertaking to supply water power produced by the artificial impounding of water by a dam and a system of canals, such as exists at Holyoke, is in effect an undertaking to supply constant human labor and attention and the use of many various commodities and materials to be purchased in the market. The maintenance of the physical plant in a state of repair and the supervision of its functioning in such a way as to meet the varying demands of the water power lessees consequently require the constant expenditure of money, the source of which, it is apparent, must be the income derived from the furnishing of the power. It would be not substantially inaccurate to contemplate the relation between the Water Power Company to its lessees as that of agent to as many principals, in the sense that for their common benefit the various mill owners virtually employ the Power Company organization to perform for them the necessary engineering, clerical and other work required by the diversion of the water of the Connecticut River to their several manufactories. If, now, the Congress be held to have the power to reduce the consideration which the lessees undertake to pay the Water Power Company for the furnishing of these services, the obligation to furnish which remains undiminished and unaltered, it is submitted that such a result would constitute, not an unjust burden upon the debtor, but, on the contrary, an unjust and possibly unbearable detriment to the business of your petitioner. In this aspect of the case it will be seen that to the extent that the Joint Resolution may be justified as to ordinary "gold clause" obligations, such as were in question in *Norman* v. *B. & O. R.R., supra,* by reason of the dislocation of the domestic economy which would result from the devaluation of the dollar with respect to debtors whose income would not have risen to meet the increase, that justifica-

tion exists in no degree in the present case. On the contrary, the perpetual feature of these contracts must, if the decree of the Circuit Court of Appeals be affirmed, necessarily have the effect of assuring to the debtor, at least as long as the resources of your petitioner can continue to contribute to it, a benefit to which in equity it would not be entitled. See *Willard* v. *Tayloe*, 8 Wall. 557. It is, of course, not the purpose of this part of the argument to rest your petitioner's position upon a claim for an equitable adjustment of the mutual rights of the parties, but simply to point out that to the extent that Congress may have been frustrated or embarrassed in carrying out its monetary policy of 1933 and 1934 by the prospect of creating unjust burdens upon "gold clause" debtors, including the Government itself, by any devaluation of the dollar, it could have been in no degree embarrassed by the existence of such obligations as are in question in this case.

It was one purpose of Congress, in the enactment of the Joint Resolution and of the related currency legislation of 1933 and 1934, to bring about by congressional action, and particularly by the devaluation of the dollar, which was, on June 5, 1933, in prospect (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. at 314), a general rise in the level of commodity prices. The Joint Resolution was considered necessary to remove doubt as to the construction of the Thomas Amendment to the Emergency Banking Act (Sen. Rep. No. 99, 73d Cong. 1st Sess., quoted in footnote, *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 314). The purpose of that amendment was stated by the Senator who presented it to be "the bringing down or cheapening of the dollar, that being necessary in order to raise agricultural and commodity prices . . ." (see opinion of Mr. Justice McReynolds in the *Gold Clause Cases*, 294 U.S. at 373, 374). The effect of this policy may already be seen; its full effect, however, has by no means yet exerted

itself, and it may be expected that, in accordance with well-known principles of economics, the tendency of the Government's monetary policy, of which the Joint Resolution is a part, will be to raise the price level in roughly the proportion to which the gold content of the dollar has been reduced. Due to the operation of other factors, the price level may not attain a proportionately high point, whereas, on the other hand, its response to the currency manipulation in connection with other factors may carry it beyond that point; it is sufficient to point out that the manipulation of the currency by Congress must inevitably, in some degree, have the effect of raising the prices of the various building materials necessary for the maintenance of the water power plant, the wages and salaries of those employed in that maintenance and in the supervision and operation of the system, and inevitably also the taxes which must be paid upon the property. To be sure, in the case of contracts only one side of which remains to be discharged, and this by the payment of a single sum of money in the relatively near future, the payment of the increased number of dollars resulting from the devaluation of the dollar might well constitute unjust enrichment, and might for that reason, and in connection with the existence of a large number of such obligations, cause some dislocation of the domestic economy. As the Chief Justice pointed out in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 315, if the income out of which the obligors of bonds must meet their obligations be determined by the new standard while their indebtedness be met by an amount of currency determined by the former gold standard, their receipts will be fixed on one basis while their interest charges and the principal of their obligations will be fixed on another. It is significant, however, that these observations are not applicable to the situation created by the indentures here in question. These indentures require the performance of

services by the Water Power Company in perpetuity, for which reason it may not be assumed, in balancing the distribution of burdens between the parties, either that taxes and costs of operation will remain substantially the same, or that the income of the debtor Writing Paper Company may not tend to increase in proportion to the increased burden of paying the rental obligations. It matters not that the debtor's income may not yet have so increased, or that your petitioner's charges have not yet increased to the full extent that may be expected; the significant fact is that on June 5, 1933, those possibilities were inherent in the situation, so that the Resolution enacted on that day must be held ineffective to remake the agreements between these parties.

The situation now before this Court finds some analogy in the facts before the Court in *Addy* v. *United States,* 264 U.S. 239 (1923), in which a certain order relating to the sale of coal, made under authority of the Lever Act, was construed as not embracing the sale of coal which had been purchased before the date of the order. The Court said, (p. 245):

> "The order *treated buying and selling as integral parts of the regulated transaction* and made no reference to expenses incident thereto. If it applied only to transactions thereafter begun, all had opportunity to govern themselves accordingly; but, if given retroactive effect, jobbers who had negotiated purchases at costs exceeding fifteen cents per ton would necessarily lose if they sold, although they had acted in entire good faith" (italics supplied).

That Congress did regard the lending of the money for which gold clause obligations were given, and the payment of those obligations, as integral parts of the transactions to be affected by the enactment of the Joint Resolution is

indicated by the following language of Representative Steagall during the debate upon the Joint Resolution:

> "Who can defend the moralities of a transaction in which a citizen incurs an obligation that may be discharged by one day of labor and through manipulation or other causes beyond his control this citizen finds it takes two days of labor to discharge this same debt? I repudiate as dishonest a dollar that presses down upon the struggling people of this country in such fashion" (77 Cong. Rec. No. 62, p. 4586).

The emphasis of this same consideration was placed by Mr. McGugin of Kansas upon the creditor's position in the following words:

> "In the first place this so-called 'gold clause' was a Shylock provision in the contract. The creditors did not lend gold in the first instance. They lent currency and bank credits. So in the light of fairness and decency they have no moral right to request the repayment of a dollar different than the dollar which they lent" (*ibid.* p. 4579).

To the same effect, Mr. Greenwood: ". . . The probabilities are that most of the purchasers who purchased the obligations of the government paid for them with lawful money of the United States and they will be paid with the same kind of money with which they purchased the obligation in the beginning" (*ibid.* p. 4581). A similar statement by representative Steagall was greeted with applause (*ibid.* p. 4586).

In this view of the situation, the effect of the Joint Resolution which is contended for by the Writing Paper Company would create a situation to which the remarks of this Court in *Adkins* v. *Children's Hospital*, 261 U.S. 525,

are strikingly apposite. In holding invalid a minimum wage law as an interference with freedom of contract which could not be justified under the Constitution, the Court said (p. 557):

> "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. . . . It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter *must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply* (italics supplied).

Those remarks have even greater force if applied to the situation now before this Court, for the reason that your petitioner is legally bound, and in perpetuity, to furnish the performance for which it is to receive, if the decree of the Circuit Court of Appeals be affirmed, only the consideration to which it would be limited by congressional action; whereas it did not, in the Adkins case, appear but that those within the terms of the law were to some extent free to escape its operation by refraining from the employment of women to which it related.

If, then, discharge of the debtor Writing Paper Company's obligation according to the decree of the Circuit Court of Appeals must place upon this petitioner an economic burden analogous to, and indeed even more onerous than, that which led this Court to invalidate the minimum wage law in question in *Adkins* v. *Children's Hospital* (*supra*), it is patent that the justification for upholding congressional mitigation of obligations for which the consideration had already been given is utterly without relevance with reference to the case now before this Court. Obligations binding the debtor to pay for a consideration not rendered at the time the Joint Resolution was passed, and which must be rendered in perpetuity, did not constitute elements of economic dislocation in the event of devaluation, so that diminution of the measure of the debtor's liability under such obligations bears no reasonable relation to the monetary policy adopted by Congress (see *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, at 313), and is contrary to the Fifth and Tenth Amendments to the Constitution of the United States.

F. No legislation or executive action other than the Joint Resolution has the effect of reducing the currency equivalent stipulated for.

It is stated in the opinion of the Circuit Court of Appeals (R. 134) that the conclusion reached by that Court rested, not only upon its construction of the Joint Resolution, but upon what it conceived to be the intent of the Government "as expressed in the several executive orders and proclamations of the President and Secretary of the Treasury . . . and Acts of Congress above referred to . . . " Morton, J., concurred in the opinion on the ground that the case was "within the scope of the decisions and opinions in the Gold Clause Cases . . ." Similarly, the debtor Writ-

ing Paper Company has contended that the decision of this Court in *Perry* v. *United States*, 294 U.S. 330, has the effect, apart from the Joint Resolution, of limiting this petitioner to recovery according to the measure of what was held to be the "equivalent" of the gold coin stipulated for in that case. Your petitioner contends that there is nothing in any of the several executive orders and proclamations of the President and Secretary of the Treasury or the Acts of Congress referred to by the Circuit Court of Appeals, or in the decision in the Perry case, which may be given the effect of interfering with the discharge of these rental provisions.

In the first place, while, as we have attempted to show, there is no question of damages in the present case, but simply the question of what amount in currency the parties intended should make up the equivalent of gold bullion in such a situation as now exists, the result of the Perry case rests upon a determination of the plaintiff's damages, and for breach of a valid obligation to pay a fixed sum in gold coin. This Court said, to be sure, that " 'equivalent' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used," but it has seemed to your petitioner, particularly in view of the inclusion of the term "equivalent" within quotation marks, and of the fact that the term was apparently employed by the Court in answering a contention of the petitioner which rested upon supposed implications of that term, that this Court by no means meant to decide that in no event, and in no sense of the word, might the equivalent of gold coin, much less of gold bullion, be ascertained in any other manner. Moreover, the value of the gold coin which this Court found to be the measure of the plaintiff's damages was expressly stated to inhere in that coin as "legal tender and as a medium of exchange under a single

monetary system with an established parity of all currency and coins'' (*Perry* v. *United States,* 294 U.S. 330, at 357).

Thus to hold that the value of the gold coins stipulated for in the Government bonds in the Perry case, if they had been paid to the plaintiff, was no more than the same nominal amount in dollars of another kind was by no means tantamount to a decision that the value of a specified amount of gold bullion on the rental dates here in question would likewise have been no more than if that bullion had been minted into coins of the old gold content.

In so far as a determination of the value, or equivalent in currency, of gold bullion on the rental dates here in question may be based upon a supposition that it have been delivered to your petitioner on those dates, it is submitted that such a supposititious state of facts does not place your petitioner in the position of one who had held gold bullion at the time when it was ordered to be turned in to the Treasury upon payment of its then equivalent.

If any valid legislative act or executive order made thereunder were held to affect the determination of the value, or the equivalent in currency, of the gold bullion in these contracts as of the rental dates in 1934 and 1935, it is submitted that, in so far as any such act or order may purport to measure such value, or equivalent, as of any date prior to such dates, and as of a date when the value, or equivalent, of gold bullion was $20.67 per ounce, such act or order would in effect operate to take the property of your petitioner without having provided for judicial determination of the compensation to be given therefor, and would therefore in that respect violate the Fifth Amendment to the Constitution of the United States (*Monongahela Navigation Co.* v. *United States,* 148 U.S. 312 (1892), at 327).

Although the suggestion has not heretofore been made in the course of these proceedings, your petitioner respectfully suggests to this Court that, if it cannot find that the

currency equivalent to be decreed to the petitioner is to be measured according to the devaluation of the dollar, the petitioner should nevertheless not be remitted to an equivalent based upon a measure analogous with that employed in the Perry case, but should be held to be entitled to the fair value of the consideration which it has furnished during the rental periods here in question (see *United States* v. *New River Collieries*, 262 U.S. 341 (1922), at 344). The "equivalent" to which Perry was held to be enfitled was in substance representative of the consideration to which he was entitled for a previous loan of dollars to the United States. The obligation to pay that "equivalent" was, moreover, drawn in terms of the monetary medium, which it was not shown had depreciated in value at the time of the decision.

In the present case, on the other hand, the equivalent sought by the petitioner represents consideration for the supply of water power after the date of the Joint Resolution, and a decree in the form given by the Circuit Court of Appeals (R. 134) may be held not only to limit your petitioner to a legally reduced currency equivalent of the rentals payable on July 1 and October 1, 1934, and on January 1, 1935, which are immediately in question here (R. 4, paragraph 3 of the petition), but to foreclose the right of your petitioner to recover any greater equivalent with respect to any rentals to become due in the future, no matter to what extent the purchasing power of the dollar may decrease.

See *Bigelow* v. *Windsor*, 1 Gray, 299 (1854).
Case v. *Mountain Timber Co.*, 210 Fed. 565 (D.C. W.D. Wash. 1914).

It is therefore respectfully submitted that, if this Court cannot grant recovery according to the measure of equivalency contended for by the petitioner, it should, rather

than remit the petitioner to the measure adopted by the Court below, find that the legal situation surrounding the possession of and dealing in gold on the dates of payment had no counterpart in what the parties intended, and that it is therefore impossible to determine the equivalent in the light of that intention.

In this respect the situation could be compared with that which would exist if the debtor had contracted to deliver, not gold bullion, but Russia Sables iron (see *Lilley* v. *Fifty Associates,* 101 Mass. 432 (1869)) or its equivalent in currency, and if all supplies of Russia Sables iron should thereafter become exhausted and impossible to procure. In such a situation the debtor must pay the value of the water power the right to which it has enjoyed. See Restatement of the Law, Contracts, sec. 468(2).

No evidence of the actual value of the water power furnished by the petitioner during the rental periods here in question was introduced in this case, inasmuch as the petitioner has based its claim for recovery upon what it believes to be the correct construction of the indentures, with the performance of which no legislative or executive act should be held to have interfered. If, however, this Court should not support the petitioner's contention, it is respectfully suggested that, rather than affirm the decree of the Circuit Court of Appeals, this Court indicate that the provisions for payment of the rentals having become impossible of performance or of ascertainment, this petitioner is not to be taken as precluded from recovering the value of its performance in some other appropriate form of action. The way to such an indication is marked by the expressions of this Court in *Louisville & Nashville R.R.* v. *Mottley,* 219 U.S. 467 (1911), at 486; *New York Central R.R.* v. *Gray,* 239 U.S. 583 (1916), at 587; *Ortega Co.* v. *Triay,* 260 U.S. 103 (1922), at 110.

Conclusion.

We respectfully submit, therefore, that the decree entered by the Court below is erroneous, and pray that it be reversed, and that the Circuit Court of Appeals be directed to enter a decree requiring payment of such sum as represents the equivalent in currency of the quantity of gold bullion named in the indentures according to the measure of equivalency stated by that Court in its opinion to be correct, if the Joint Resolution did not apply to these contracts, or one dollar for each 15 5/21 grains of gold .9 fine.

Respectfully submitted,

BENTLEY W. WARREN.

Nathan P. Avery,
James M. Healy,
Donald C. Starr,
Of Counsel.

Appendix A.

Joint Resolution of Congress of June 5, 1933.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby

repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

" 'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p.m."

FILE COPY

In the

Supreme Court of the United States

October Term, 1936.

No. 180.

Holyoke Water Power Company,

Petitioner,

vs.

American Writing Paper Company, Inc.,

Respondent.

Brief of Respondent American Writing Paper Company, Inc., in Opposition to Petition for Writ of Certiorari

JOHN L. HALL,
CLAUDE R. BRANCH,
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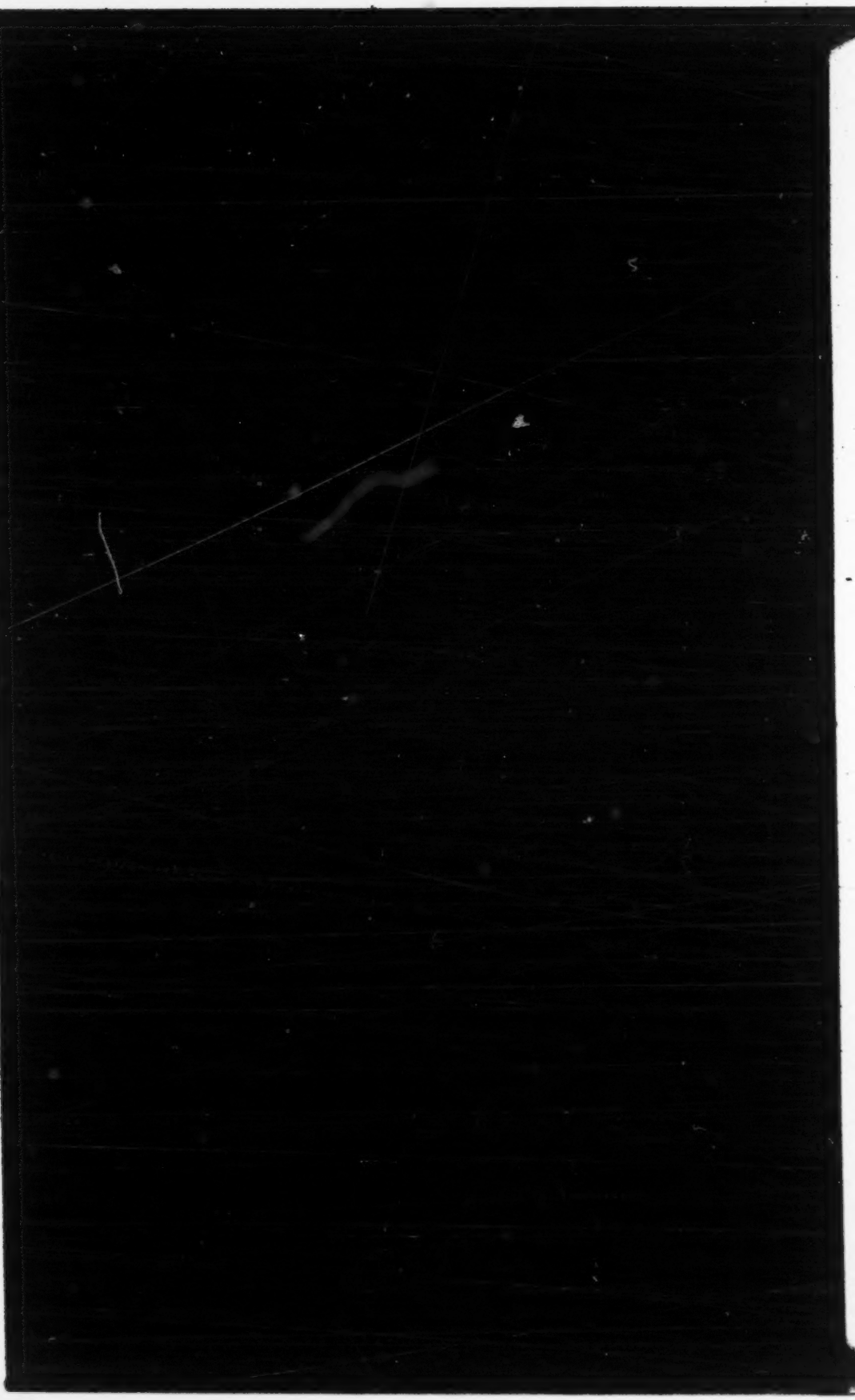

In the

Supreme Court of the United States.

October Term, 1936.

No. 180.

HOLYOKE WATER POWER COMPANY,

PETITIONER,

v.

AMERICAN WRITING PAPER COMPANY, INC.,

RESPONDENT.

Brief of Respondent American Writing Paper Company, Inc., in Opposition to Petition for Writ of Certiorari.

THE ESSENTIAL FACTS.

The issue is the amount of rental payable under certain indentures executed between 1880 and 1898, which read:

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894 or the equivalent of this commodity in United States currency."

The petitioner claimed $2539.69, which is at the rate of $35 an ounce.

The respondent contended that the rentals were dischargeable dollar for dollar under the Joint Resolution of June 5, 1933, and paid $1500.

The Reasons why the Petition should be Denied.

A. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS AN INTERPRETATION OF THE MEANING OF THE RENTAL PROVISIONS IN THESE PRIVATE INDENTURES IN QUESTION, AND NOT A CONSTRUCTION OF THE JOINT RESOLUTION OF CONGRESS OF JUNE 5, 1933.

The District Court, by McLellan, J., in the previous case which Brewster, J. referred to and stated that he felt bound by (Record, 71), declined to apply the Joint Resolution to these indentures, saying,

> "The indentures contain no covenant to pay any definite sum of money. The number of dollars mentioned was the means of determining the amount of gold to be delivered or the amount of gold the equivalent whereof was to be paid in currency. The result which the defendant seeks cannot be reached in this way, without doing violence to the intention of the parties as expressed in their contracts" (quoted by Brewster, J., 71; the underlining is ours).

The District Court, nevertheless, found that the "equivalent . . . in United States currency" was the same as if it had applied the Joint Resolution, and so came to the conclusion that the rentals had been satisfied by the respondent's payment of $1500.

The Circuit Court of Appeals came to the same conclusion, but on the ground which the District Court had rejected.

The Circuit Court of Appeals said that, since the discharge of the rentals in gold had been eliminated by reason of the impossibility of delivering gold, the indentures became contracts for the payment of money measured in terms of gold, or, in other words, "gold value clauses"; and that, as such, under the decisions of this Honorable Court in the *Gold Cases*, they fell within the provisions of the Joint Resolution. The Circuit Court of Appeals said,

> "The Supreme Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, p. 314, referring to the provision in the bonds of the defendant to pay the principal amount and coupons due February 1, 1934, in gold coin of the weight and fineness, in one instance of February 1, 1930, and in two other cases of May 1, 1903, said: that 'if the clauses are treated as "gold value" clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition,' obviously referring to the prohibition contained in the Joint Resolution. Therefore, while the indentures involved here originally were contracts for the payment of gold as a commodity measured in gold dollars, by the Acts of Congress and the proclamations of the President and the Secretary of the Treasury above referred to, they have become contracts for the payment of money measured in terms of gold and so are also hostile to the policy of Congress.
>
> "In other words, the provisions as to rentals in these indentures by reason of the exclusion of gold for monetary use have become gold value clauses within the meaning of the decisions in *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U. S. 240, and *Nortz* v. *United States*, 294 U. S. 317; and the rentals measured in

terms of dollars, viz.: $1500 of gold coin of the United States of the weight and fineness of the coinage of 1894 became, under the Joint Resolution, dischargeable dollar for dollar in any currency which was legal tender when they became due.

"As Mr. Justice Stone said in his concurring opinion in *Perry* v. *United States*, 294 U. S. at p. 360: 'It is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery' " (97-98).

Thus, the District Court construed these indentures one way and ruled that they did not come under the Joint Resolution. The Circuit Court of Appeals construed them a different way and ruled that they did come under the Joint Resolution as gold value contracts, following the recent decisions of this Court. The contention of the respondent was sustained by both courts, though for different reasons. If the Circuit Court of Appeals were wrong in its application of the Joint Resolution, the ruling of the District Court, that the "equivalent" of the gold in currency was $1500, brings the case to the same conclusion. If certiorari be granted, this other reason for reaching the same result should be considered, and the case affirmed.

We respectfully submit that the question is simply one of the construction of a private indenture, which, as construed by the Circuit Court of Appeals, falls clearly within an unambiguous provision of the Joint Resolution, whose meaning, moreover, had been confirmed and established by a ruling of this Court. There is, therefore, no question which calls for review.

B. THE PROPER CONSTRUCTION OF THESE INDENTURES IS NOT SUCH A QUESTION OF LOCAL LAW AS CALLS FOR REVIEW OR CORRECTION.

The rental provisions in question are rare, if not unique. As the Circuit Court of Appeals in its opinion took occasion to say, these indentures are *"unusual contracts"* (100).

C. THE ONLY IMPORTANCE OF THE DECISION ON WHICH THE PETITIONER HERE SEEKS REVIEW IS ITS EFFECT UPON THE PETITIONER'S OWN FINANCES.

In its petition (page 8) it asserts that "the determination of this question involves the continued solvency and existence of the Holyoke Water Power Company."

That is no reason why this petition should be granted.

Moreover, the Circuit Court of Appeals considered this argument, and said,

> "The petitioner can pay its taxes, workmen, for materials and interest on its obligations and all other expenses in the same currency it receives, which is legal tender for all public or private debts. It does not have to pay out currency based on a standard unit of value containing 25.8 grains of gold and receive currency based on a unit of value containing 15 5/21 grains of gold. It receives and pays out currency based on the same standard, viz.: a gold dollar containing 15 5/21 grains of gold, nine tenths fine. Except in so far as the prices of labor and materials may have been increased by the devaluation of the dollar, it suffers no hardship. The prices of labor and materials are always subject to fluctuation without any change in the standard unit of value of the currency.

"Nor is the appellant the only one affected by a change in the standard unit of our currency. Every person whose income is derived from a stated salary, or wage, or is derived from interest on bonds, or dividends on stocks, may be affected in the same way, though not to the same extent" (101).

D. THESE INDENTURES ARE NOT COMMODITY CONTRACTS. THEY OFFER NO OCCASION FOR A DETERMINATION OF THE QUESTION WHETHER THE JOINT RESOLUTION APPLIES TO A SIMPLE COMMODITY CONTRACT FOR THE DELIVERY OF GOLD.

Even as originally drafted and executed, before the delivery of gold became impossible, only speciously were they commodity contracts. For they were always performable, in strict accordance with their terms, by the payment of "the equivalent of this commodity in United States currency." Such a performance was, therefore, expressly contemplated by the parties. In fact, they are not commodity contracts at all, but gold value contracts.

The Circuit Court of Appeals was wholly right when it construed them as gold value contracts and followed the decisions of this Court in the *Gold Cases* (97-98, quoted above in this brief).

The petitioner has quoted (page 8 of the Petition) from what Mr. Justice Bradley said in the *Legal Tender Cases* (12 Wall. 457, at 566).

Mr. Justice Bradley was construing a statute different in its terms and application. However, the petitioner has mutilated his remark by omitting the sentences immediately preceding and immediately succeeding. These sentences make it clear that Mr. Justice Bradley would not have regarded these indentures as "bona fide" contracts for "a specific commodity."

We give the full context of all these sentences, italicizing what the petitioner omitted, as follows:

> "*So long as the money of the country, in whatever terms described, is in contemplation of the parties, it is the object of the legal tender laws to make the credit of the government a lawful substitute therefor.* If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is bona fide for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed. *But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case.*"

Respectfully submitted,

JOHN L. HALL,
CLAUDE R. BRANCH,
CHARLES P. CURTIS, JR.,
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Supreme Court of the United States.

October Term, 1936.

No. 180.

Holyoke Water Power Company,
Petitioner,

v.

American Writing Paper Company, Inc.,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE AMERICAN WRITING PAPER COMPANY, INC., RESPONDENT.

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In the

Supreme Court of the United States.

October Term, 1936.

No. 180.

HOLYOKE WATER POWER COMPANY, Petitioner,

vs.

AMERICAN WRITING PAPER COMPANY, INC., Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE AMERICAN WRITING PAPER COMPANY, INC., RESPONDENT.

Opinions Below.

The opinion of the District Court of Massachusetts, reprinted in full in Record 104-111, is reported in 11 Fed. Supp. 518 (July 2, 1935); that of the Circuit Court of Appeals for the First Circuit, likewise reprinted in full in Record 124-134, is reported in 83 Fed. (2d) 398 (April 15, 1936).

The opinion of the District Court in the previous case between the same parties on the same indentures may also be referred to. It is reported in 9 Fed. Supp. 451 (January 2, 1935).

The Jurisdiction.

A writ of certiorari issued from this Court to the Circuit Court of Appeals for the First Circuit on October 12, 1936, on the petition of the Holyoke Water Power Company. The jurisdiction of this Court rests upon section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Questions Presented.

The issue is the amount of rentals payable under certain indentures of lease or grant from the Holyoke Water Power Company, the petitioner here, to the predecessors in title of the American Writing Paper Company, Inc., the respondent, of land and water rights in Holyoke, Massachusetts.

These indentures were executed in Holyoke between 1880 and 1898, and they provide for the payment of rentals in Holyoke in the following typical form:

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency."

The petitioner, Holyoke Water Power Company, claims that the rentals due July 1, 1934, October 1, 1934, and January 1, 1935 under this provision amounted to $2539.69, which is at the rate of $35 per ounce of pure gold.

The respondent, American Writing Paper Company, Inc., paid $1500 in currency, contending that these rentals were dischargeable dollar for dollar under the Joint Resolution of Congress of June 5, 1933, or, which comes to the same thing, that the "equivalent" is to be paid, not at the rate of $35 an ounce, but at the rate of $20.67.

This issue involves the following questions:

Does the Joint Resolution of June 5, 1933, render these rentals dischargeable dollar for dollar?

Is the Joint Resolution so applied and so operative constitutional?

Does "the equivalent" amount to $20.67 per ounce or to $35 per ounce of gold?

Does the devaluation of the dollar entitle the petitioner to anything more than $20.67 per ounce?

The Statute Involved.

THE JOINT RESOLUTION OF CONGRESS.

To assure uniform value to the coins and currencies of the United States.

June 5, 1933.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) every provision contained in or made with respect

to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

§ 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) hereto-

fore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p.m.

Summary of Respondent's Argument.

The rental provisions in these indentures are not really commodity contracts. They do not require the obligor to deliver a commodity. They are gold value contracts, because they provide for payment either in gold or in the equivalent of gold in currency *at the option of the obligor*. Since the performance of either alternative is a full performance of the contract, the contract may be fully satisfied by the payment of money without the delivery of a single ounce of any commodity at any time. If this were a commodity contract, the money payment would be damages for the breach of a contract to deliver the gold, not, as it is, the performance of the contract in accordance with its very terms. Plainly it imposes no obligation upon the obligor to deliver gold as a commodity or otherwise. The obligation is to deliver the *value* of gold, either by the delivery of the gold itself or of its equivalent in money. Simply calling the measure of the equivalent money a commodity does not make the contract a commodity contract.

We have, therefore, not a gold contract but a *gold value* contract.

The recent gold legislation of 1933-1934, which must be taken as a legislative unit, and of which the Joint Resolution of 1933 was only one part, did two things: (1) It eliminated the alternative of gold by making it impossible to pay in gold; and (2) it rendered the remaining alternative

of money dischargeable dollar for dollar. For that was an obligation to pay an amount of money measured by gold, and expressly covered by the Joint Resolution. Congress banned gold as well as gold coins, and took action to put *all* gold value contracts on a uniform basis of parity.

The Joint Resolution declares to be against public policy any obligation purporting "to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby." This language embraces the present contract, since it expressly calls for gold or an amount of currency measured thereby. Under the terms of the Resolution, therefore, this contract is dischargeable dollar for dollar in currency.

The petitioner contends that the Joint Resolution was not intended to apply to the present contract because the formula prescribed for the discharge of contracts *i.e.*, by payment "dollar for dollar" is not adapted to a contract which refers to dollars only for the purpose of fixing a quantity of gold which, in turn, is to be taken as the measure of payment in currency. The petitioner argues that the reference to dollars in this indenture was merely incidental and fortuitous; that the parties could have achieved the same result by providing for a certain number of ounces of gold with no mention of dollars whatever; and that a formula discharging the contract "dollar for dollar" does not apply where the contract contained no reference at all to dollars.

This argument is based on a practical inconvenience which does not exist in this case. For here there is an express reference to a fixed amount of dollars and here there is no difficulty whatever in applying the formula for discharge "dollar for dollar." Moreover, the petitioner's argument, if accepted, would confine the Resolution to contracts calling for a particular kind of coin or currency, or

their equivalent, and would read out of the Resolution entirely the provision which prohibits contracts requiring "payment in *gold* . . . or in an amount in money . . . measured thereby." This provision must mean that the Resolution was intended to apply, not only to contracts which provide for the payment of currency in the equivalent of *gold coin*, but also to contracts, like the present, providing for payment of currency in the equivalent of *gold*.

What we have here is an express gold value clause. It is what the gold clause in *Norman* vs. *Baltimore & Ohio R. Co.* was construed to be. What was there implied by the parties and construed by the Court is here expressed by the parties. The decision in that case is decisive here.

As the Joint Resolution was held constitutional in the *Norman* case, so it is constitutional here as applied to these rental clauses. The monetary power of Congress extends over money contracts measured in terms of gold as well as over contracts for gold coin. Whether it would extend to contracts attempting to make other commodities the measure of money is beside the point. Gold has been used as money and as the measure of money too long to relieve it of the public burden of regulation by Congress.

Nor is the Joint Resolution as applied to these rental clauses invalid because there may be so few of them that they alone might not reasonably be regarded as an obstacle to the effective exercise of Congressional power. That is not the point. The point is whether they are to be made an exception to an exercise of that power which expressly includes them. Congress, by this Joint Resolution, expressly included obligations to pay an amount of money measured by gold as well as obligations to pay gold coin. There is no reasonable ground for singling them out as an exception. To single them out would strike at the very reason for giving the power to Congress, which was uniformity. Moreover, if they and such as they were exempted, the exception

would soon become the rule, as the only way men would have to fix promised money values in terms of gold.

But, even if the Joint Resolution cannot be applied to these rental clauses, whether as inapplicable or as invalid if so applied—even if there had been no Joint Resolution, yet the equivalent in money which these indentures call for is at the rate of $20.67 per ounce of gold. This result is reached quite independently of the Resolution. The usual doctrines of the law of contracts, applied to the situation created by the impossibility of paying in gold, require it.

The measure of the equivalent of the gold in money is what the gold would have been worth to the petitioner if it had been paid. That is what the petitioner contracted for with the word "equivalent." It cannot mean more than that without belying its own name.

An examination of the relevant Treasury Regulations shows that, if the gold had been paid, the petitioner could have got for it $20.67 per ounce, not $35 per ounce or any other sum.

The reduction of the gold content of the dollar by the Gold Reserve Act of 1933 and the Presidential Proclamation made no difference to that result. Devaluation made the gold worth no more to the petitioner. It could have got no more dollars for such gold after the devaluation than before.

This is the same result we reach by applying the Joint Resolution, and it is just the result we should expect from the fact that the Gold Reserve Act, the Presidential Proclamation, the Treasury Regulations, and the Joint Resolution are all of them parts of one whole, all directed to the same end.

Perry vs. *United States* held that this was so for gold coin, and there is no reason to give more for gold bullion

than for gold coin. The determination of the equivalent in that case is decisive of its determination here at $20.67 per ounce.

The petitioner has shown no loss to it here, any more than Perry in that case showed any loss to him there. We have only the certainty that the respondent is being asked to pay 69 cents a dollar more than it has been paying—a gratuitous loss to it and a windfall to the petitioner.

Argument.

I.

THE JOINT RESOLUTION RENDERS THESE RENTALS DISCHARGEABLE DOLLAR FOR DOLLAR BY THE PAYMENT OF $1500.

A. These Are Gold Value Clauses.

The indentures provide for the payment of rentals in "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency."

It seems clear enough that the parties were measuring their rentals by the value of gold.

Not gold, but the value of gold. Or else the Power Company would not have left the option of paying the equivalent in currency to its debtors, as it did. That option was in the hands of the obligor, and thereby these rental provisions became gold value contracts, not gold commodity contracts. A contract under which the obligor, not the obligee, has a right to decide upon the delivery of a commodity can scarcely be called a commodity contract. The Power Company did not want, nor did it intend to get, gold, not even in order to hoard it. For it made no attempt to require its grantees to deliver gold to it. These indentures

impose no obligation on the obligor to deliver gold, as a commodity or otherwise. The obligation is to pay the *value of gold*, either by the delivery of the gold itself or by the payment of its equivalent in money. Gold is the measure of the money equivalent.

It makes no odds that the measure of the value is referred to as a commodity. A contract becomes a commodity contract by reason of the thing contracted for. It does not become a commodity contract because the thing contracted for is measured by a commodity. You cannot make it a commodity contract simply by calling the measure of the thing contracted for a commodity.

The payment of the "equivalent of this commodity in United States currency" is a full performance of the obligation. If this were a commodity contract, payment of the equivalent would be damages for the failure to deliver the gold, not a performance of the contract in strict accordance with its very terms. This is not a suit for damages for the breach of a contract to deliver a commodity. It is a proceeding for the determination of the proper amount of a claim under the indentures.

Moreover, we must consider the character of the gold to be delivered if the obligor elects the first alternative of performance. The gold called for is gold of the fineness, as well as the weight, of the gold coin of the United States. The indentures say that it is to be "equal in amount to [so many] dollars of the gold coin of the United States of the standard of weight and *fineness* of the year [so and so]." *

That is coin gold. So even this alternative was performable, in strict accord with its express terms, and most conveniently, by the payment of so many gold coins.

However, the point is not important, coin gold or gold coin. For, so far as the petitioner is concerned, either is

* Respondent's 5th request (R. 101) was granted (R. 103), and the Circuit Court of Appeals agreed (R. 125, bottom).

really but the measure of the value of the equivalent, and there is no difference between so many ounces of coin gold and the same number of ounces of gold coin when each is only a measure of the value of the equivalent in United States currency, which the obligor had the option to pay.

Such were the rental obligations of these indentures until the recent gold legislation of 1933 and 1934.

B. The Joint Resolution is an Integral Part of the Recent Gold Legislation.

Until the Legal Tender Act of 1862, the only legal tender in the United States was gold and silver. Throughout the greenback period, and until March, 1933, gold as well as silver remained both legally and actually in circulation.

On March 6, 1933, the President declared the Bank Holiday, and on March 9, 1933, Congress empowered the President to "investigate, regulate, or prohibit . . . [the] export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States . . . ," and at the same time authorized the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States "any and all gold coins, gold bullion, and gold certificates." By Executive Orders and Treasury Regulations these powers and authorities were exercised and the purpose of Congress carried into effect.

Thereby gold, *in bullion as well as in coin,* for the first time was banned and passed out of circulation, both legally and actually.

That was the background for the Joint Resolution of June 5, 1933, which declared every obligation, payable in money of the United States, which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency or in an amount in money of the

United States measured thereby, to be against public policy and dischargeable dollar for dollar in any legal tender.

In the course of the summer and fall there followed further and more detailed Executive Orders and Treasury Regulations on the subject which in substance forbade any monetary use of gold.

Then, on January 30, 1934, five months before the first of the rentals in this case came due, Congress passed the Gold Reserve Act of 1934. The next day the President reduced the gold content of the dollar, and at the same time the Secretary of the Treasury made new Regulations regulating all uses, and maintaining the prohibitions against any monetary use, of gold.

It would be tedious as well as unnecessary to set forth these measures in any further detail. They were fully expounded to this Court, and this Court has itself given their substance and their effect in its opinion in *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, at 295-297.

One point, however, should be emphasized. It is contained in the statement with which this part of the opinion opens and closes.

It begins:

> "The Joint Resolution of June 5, 1933 was one of a series of measures relating to the currency. These measures . . ."

It ends:

> "The Resolution must, however, be considered in its legislative setting and in the light of other measures *in pari materia.*"

This legislation, all of it, must be regarded as a whole, of which the Joint Resolution is an integral part.

C. The Joint Resolution Applies to All Gold Value Clauses in Obligations Payable in Money of the United States.

1. The Resolution Applies to These Rentals by its Very Terms.

The first and immediate effect of this legislation was to eliminate any option as to the method of payment. After the Bank Holiday, in early March of 1933, it became impossible to make any payments or deliveries of gold, whether in coin or in bullion. It was impossible in fact, because the Orders made by the President and the Secretary of the Treasury under the authority of the Emergency Banking Act of March 9, 1933, were being enforced. It was impossible in law under the terms of those Orders and that Act.

The first alternative method of payment was, therefore, effectively eliminated from the indentures. The obligation was reduced to an obligation under which the obligee had a right to require payment of the equivalent of that now impossible gold in United States currency.

That is an obligation which falls pat under the provisions of the Joint Resolution. For what is that but an obligation which purports to give the obligee a right to require payment in an amount in money of the United States measured by gold, payable in money of the United States? That is the obligee's right, and the only right it had, and under the Joint Resolution it became dischargeable dollar for dollar. This was the conclusion of the Circuit Court of Appeals (see R. 134).

We submit, however, that these indentures have always been such gold value contracts as are declared against public policy and made dischargeable dollar for dollar by the Joint Resolution.

Our obligation is a combination of two obligations in the alternative, of which the first calls for the delivery of a stated quantity of gold and the second calls for the payment of its equivalent in currency. This is precisely what the Resolution expressly covers, that is, an—

> "obligation which purports to give the obligee a right to require payment in gold . . . or in an amount in money of the United States measured thereby"—

which at the same time is "payable in money of the United States." In other words, the obligation in our indentures meets all the conditions of the Resolution. Its first alternative purports to give the obligee a right to gold, and its second calls for an amount in money measured by the gold, *i.e.*, makes it payable in money.

Is it any objection that the Resolution did not contemplate obligations in the alternative, but different sorts of obligations? It may well be that the Resolution was intended to cover these several kinds of obligations one at a time, so to speak. Yet the comparison is not the less valid. For the two which are contained in our indentures are both covered by the Resolution. Let the obligor turn from one of its alternatives to the other, and thereby give the obligee a right to require first one, then the other; yet the obligation remains within the Resolution. The obligation, however the obligor may choose, is one that purports to give the obligee a right to require payment in a manner prohibited. The obligation cannot be performed without doing what the Resolution declares to be against public policy, and, as we have seen, either form of performance is dischargeable dollar for dollar.

Judge McLellan suggested that the fact that the obligation could be performed without the payment of money would prevent the Resolution from applying before that

possibility had been eliminated (9 Fed. Supp. at 453). But the provision of the Resolution which requires the obligation to be "payable in money of the United States" does not mean that it *must* be so payable and *only* so payable. It is enough that they *may* be so payable according to their terms.

If we have recourse to dictionary definitions of the word "payable," we find that Webster gives: "That may, can, or should be paid; justly due"; the Century Dictionary says: "1. That can be paid, or is to be paid; capable of being paid; 2. To be paid; due: as, bills payable"; and Black's Law Dictionary: "Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."

2. Norman vs. Baltimore & Ohio Railroad Company is a Binding Precedent.

The Circuit Court of Appeals accepted the decision of this Court in *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, as a binding precedent (R. 130-131).

The bonds in that case had the usual gold coin clauses, but they were construed and treated as gold value contracts.

The obligor argued that the obligation was one for the payment of money, "a gold coin and not a gold value clause; that is, it does not imply a payment in the equivalent of gold in case performance by payment in gold coin is impossible" (p. 298). He argued that the parties intended that the bonds should be negotiable, and hence that it should not be regarded as one for the payment of an indeterminate sum ascertainable only at date of payment.

The bondholder, on the other hand, opposed that interpretation as inadequate and unreasonable. He insisted "that the words of the gold clause clearly show an intent 'to establish a measure or standard of value of the money to be

paid if the particular kind of money specified in the clause should not be in circulation at the time of payment' " (p. 299) and that to deny his right to the equivalent would be a nullification of the clause.

This Court ruled in favor of the bondholder. On page 302 this Court, rejecting the interpretation that the gold clauses then before it were contracts for the payment of gold coin as a commodity or in bullion, said that they were contracts for the payment of money, and added:

> "We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

Further along in the opinion (p. 313) it is said:

> "It is apparent that if these promises *were to be* taken literally, as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin." (Our italics.)

Then, on the next page (p. 314), comes the sentence quoted and relied on by the Circuit Court of Appeals (R. 130):

> "But, if the clauses *are* treated as 'gold value' clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition."

In brief, the Court said that they were neither commodity contracts nor pure money contracts, but *gold value con-*

tracts. And this is how Mr. Justice Stone in his concurring opinion in *Perry* vs. *United States,* 294 U.S. beginning at 358, understood that the Court had taken them. He said, on page 360:

> "Moreover, *if the gold clause be viewed as a gold value contract, as it is in Norman* vs. *Baltimore & Ohio R. Co.,* supra, it is to be noted that the Government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery."

The rental provisions in our indentures simply spell out what was implied in the Baltimore & Ohio bonds in the *Norman* case and what this Court construed them to mean.

Those bonds provided for the payment of a specific number of dollars in gold coin. That is an ambiguous combination of two essentially different things—the two different values in gold coin. One is the statutory value ascribed to gold coin by Act of Congress which established it as legal tender. This value does not depend upon the material out of which it is made. It results solely from the statutory declaration. The other value of a gold coin is the commodity value of the quantity of the precious metal contained in it. This does not depend upon the fact that the gold is coined. It results solely from the fact that it is a precious metal.

This Court recognized that such clauses were intended for protection against a depreciation of the currency, and said that, by calling for a specified number of dollars in gold coin, the parties intended, not merely the statutory value, but the value of the gold itself. This gold value is nothing more nor less than what we have here—an equiv-

alent in money of the quantity of gold equal in amount to the specified number of the gold coins. That is precisely what our indentures call for.

There is, we submit, no distinction to be drawn, so far as the Joint Resolution is concerned, between the bonds before the Court in the *Norman* case and these indentures.

D. Reply to Objections.

(1) The petitioner says that the Resolution does not provide for the discharge of the first alternative of the obligation which permits payment in a quantity of gold. We do not agree to that, because the quantity of gold is measured by gold coin, but even if we did, the question is academic, because this first alternative does not stand alone. It was coupled with the other alternative. This was never simply a contract to pay gold. It was a contract to pay gold-or-its-equivalent, which later became, by operation of an impossibility created by law, a contract to pay the equivalent of the gold.

(2) The petitioner contends that the parties did not intend that the equivalent should be discharged at the face value of its measure, notwithstanding a depreciation of the dollar, and refers to the bonds in the *Norman* case, which, as this Court has stated, were intended to afford a definite measure of value, and to protect the parties against depreciation and against their discharge by a payment of less value (Petitioner's Brief, pp. 18-20). But whatever the intention of the parties, if it runs counter to the Resolution, it does not prevent the Resolution from applying. The purpose of the Resolution was the overriding and defeat of just such intentions. All gold obligations were to go on the same basis, notwithstanding the intention of the parties.

(3) The petitioner argues that the Joint Resolution only applies to obligations based upon gold coin, and not to obligations based simply on gold. But in both the preamble

and in section (a) of the Resolution, the prohibition is extended to contracts purporting to require "payment in gold or a particular kind of coin or currency . . ." or in money measured thereby. To say that the word "gold" means nothing more than *gold coin*—to make an adjective out of it—twists it into a mere tautology, because obligations based on gold coin are directly covered by the language of the very next provision: "a particular kind of coin or currency." If Congress had intended the Resolution to include only obligations based upon *coin*, the express reference to contracts payable simply "in gold" could have been, and would have been, omitted.

If the Resolution be confined to gold coin, it will be the only part of the recent gold legislation that is. All the rest, of which it is only a part, covers bullion as well as coin. The Resolution is part of the apparel in which Congress clothed its policy, and if it covers only gold coin, it will be like a shirt that comes short.

If obligations measured by gold bullion are not covered by the Resolution, it draws a distinction where no substantial difference exists, between one kind of gold value clause and another. Men could contract for values measured in gold simply. They would be prohibited only from contracting for values measured in gold that had been coined. The Resolution would become as easy to evade as it is for a lawyer to draw a new instrument.

The petitioner relies on the legislative history of the Resolution and the debates in Congress to show that the legislators had only gold coin contracts in mind when the Resolution was passed. Without discussing the relevancy of debates in Congress as bearing upon the present question (see *Pennsylvania R.R. Co.* vs. *International Coal Co.*, 230 U.S. 184, 198-199), it is sufficient to say that they do not support the petitioner. They show, perhaps, that gold coin bonds were the obligations which were most talked

about, a result only natural in view of their great number and importance. But these debates are far from showing an affirmative intent to limit the legislation to that particular form of contract or to exclude from the Resolution other types of *gold value* contracts. It serves no purpose to show that ordinary commodity contracts were intended to be excluded, for the Resolution itself so provides by restricting its operation to obligations "payable in money . . ." We are not concerned with such a contract here.

The volume and importance of gold coin contracts showed the need and provided the occasion for legislation which was intended to cover the *entire field* of gold value contracts. All gold value contracts were intended to be put upon the same basis, because gold formed the basis of the nation's currency. Both Congressman Steagall, who was in charge of the Resolution on the floor of the House, and Senator Fletcher, who presented it to the Senate as chairman of the Committee on Banking and Currency, made the following statement. It is the same, word for word. Evidently both were reading a prepared statement. Both of them said:

> "If in the exercise of its expressed powers to borrow money and to coin money and regulate its value, the Congress finds that *provisions which purport to give to the obligee a right to require payment in gold—the basis of the Nation's currency—or in any particular kind of money or in an amount in money measured thereby,* obstruct the power of Congress to regulate the value of money and are inconsistent with the declared policy of Congress to maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts, the Supreme Court will accept such findings" (77 Cong. Record, 4529 and 4893). (Italics ours.)

(4) Another objection is based upon an asserted difficulty in fitting the dollar-for-dollar provision of the Joint Resolution to the amounts of gold in the indentures.

But the equivalent of "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894" was intended to be discharged dollar for dollar of the amount stated. The Power Company, during all these years, must have been receiving in discharge of these rentals precisely that sum, dollar for dollar, a dollar in currency as the equivalent of the quantity of gold equal in amount to the $1500 in gold coin. That was the equivalent, and it was dollar for dollar. It is a little absurd for it now to say that the language of their contract is not adapted or susceptible to such payment or that it cannot be done without doing violence to the intention of the parties. If any violence has been done to that intention, it has been done by virtue of the operation of the Joint Resolution, not by the Court which applied it.

If these rental clauses fall under the Resolution's declaration of public policy, and yet are not at the same time rendered dischargeable dollar for dollar, what is their status?

Is it possible that these indentures are simply unenforceable? It would be absurd to suggest that the petitioner's claim should be denied *in toto* as contrary to public policy.

Congress must surely have intended that its provision for a dollar for dollar discharge should be coterminous with its declaration of policy and its prohibition.

Take an obligation to pay so many grains or ounces of pure gold or its equivalent in money, which is what the petitioner says we really have here. It is not difficult to divide the number of ounces by 25.8 grains, the number in the old gold dollar, and thereby find the number of dollars with which to discharge the obligation. It is as easy as

dividing by 15 5/21 grains, which the petitioner would have us do to discharge the obligation in new dollars. Indeed, the petitioner in effect admits that its rentals are dischargeable dollar for dollar when it urges that they should be discharged in new dollars instead of old. For it contends that the specified quantity of gold should be commuted into new dollars instead of old dollars, dividing by 15 5/21 grains instead of by 25.8. See petitioner's brief, pp. 17 *et seq.*, specially 30-31.

E. The Joint Resolution is Constitutional as Applied to These Indentures.

These are gold value clauses, and gold value clauses are subject to the sovereignty of the monetary policy of Congress. *Norman* vs. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 311-316.

We are not going to reargue that case. We submit it as a binding precedent. Congress has the same power over contracts written for the value of gold bullion as it has over contracts written for the value of gold coin. If Congress may call in and appropriate gold bullion as well as gold coin (*Nortz* vs. *United States*, 294 U.S. at 328), Congress may abrogate contracts for the equivalent of the bullion as well as for the equivalent of the coin. Congress has the power to put the country on a gold bullion instead of a gold coin basis. The one as well as the other is an allowable variant of a gold standard.

But, it is suggested, the reason why the gold value clauses in question in the *Norman* case could constitutionally be abrogated was the great volume of them—seventy-five billions of them. In the words of the report of the House Committee on the Joint Resolution, "If the gold clause applied to a very limited number of contracts and securities, it would be a matter of no particular conse-

quence" (H.R. No. 169, 73d Congress, 1st Session). And it is said, without proof, there are but few such contracts as these. Therefore the petitioner argues that provisions of the kind found in these indentures cannot be held to interfere with the constitutional power vested in Congress to regulate the currency, and hence that the Joint Resolution applied here deprives it of its property without due process of law and is beyond the delegated power.

If Congress had singled out only such provisions as we find in these indentures and abrogated only these, the respondent might have argued that it was an unreasonable classification and an arbitrary act. For there is no reason to make them an exception. In the interest of uniformity, if nothing more, such contracts as these not only might be, but should be, included in the congressional prohibition. The policy of Congress was to include all gold value clauses of every kind. Congress had power to include all of every kind. The hypothesis, that Congress had no power to single out one particular kind which might be few in number, too few to interfere with its policy of monetary regulation, is certainly no basis for the petitioner to argue that Congress has made an exception of that particular kind. The proposition that Congress could not have abrogated only such contracts as these is no reason for denying Congress the power of including them in its exercise of power.

If the Court should make these indentures and such as these an exception, because there may be too few of them now to interfere with the present policy of Congress, it is probable that they would become the rule simply by reason of the fact that they have been made the exception. If such gold value clauses as are contained in these indentures were exempted and excluded from the power of Congress to prevent interferences with its monetary policy, they will be taken up, developed, and become the usual medium by which men seek to stabilize money values in terms of gold.

II.

"THE EQUIVALENT OF THIS COMMODITY IN UNITED STATES CURRENCY" IS THE $20.67 AN OUNCE WHICH HAS BEEN PAID.

Even if the Joint Resolution be held not to render these rentals dischargeable dollar for dollar, whether because it is inapplicable, or, though applicable, because, so applied, it is unconstitutional, the judgment of the Circuit Court of Appeals must still be affirmed. For, even if there were no Joint Resolution, the decree of the District Court is effectively supported on its own ground, that the equivalent equals $20.67 per ounce of fine gold.

A. The Rules Applicable to the Determination of the Equivalent.

As we have already said, this "equivalent" is a payment provided by the obligation itself. It is not a compensation in damages for a breach of the obligation provided by the law. But both are measurable on the same principles.

The equivalent would be that amount of currency which would leave the creditor, the petitioner, as well off in currency as it would have been had it received the stipulated quantity of gold. In *Perry* vs. *United States,* 294 U.S. 330, at 357, this Court said:

> "Plaintiff demands the 'equivalent' in currency of the gold coin promised. But 'equivalent' cannot mean more than *the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used.*" (Our italics.)

That is, of course, the same thing as damages. In the words of this Court in *Hicks* vs. *Guinness,* 269 U.S. 71, at

80, which was an action brought for a debt due in the United States payable in German marks:

> "The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is 'the loss of *what the contractor would have had if the contract had been performed.*'" (Our italics.)

The indentures call for gold delivered in Holyoke. The value of gold elsewhere, say at the nearest available market, is relevant only to determine the value in Holyoke, only as evidence of its value on that spot, with shipping charges added, on the assumption that it could be shipped to Holyoke. When that is impossible, the evidence is irrelevant. The impossibility of delivering the commodity at the time and place covenanted does not permit one of the contracting parties to force the other into the accord and satisfaction of delivery elsewhere.

The assumption which we must make is the delivery of gold at the time and place promised, and not in any other place or at any other time. As the District Court said (R. 107):

> "The contracts were to be performed in Holyoke, and the debtor was under no obligation either to perform the contract in London or any other foreign market or to import gold for the purpose of selling it to the United States mints and turning the proceeds over to the petitioner."

The equivalent is not the price which the parties could have obtained if they had bought gold in London, imported it, and sold it to a mint (Errors Assigned; R. 112). That is based upon the mistaken principle that the equivalent is to be determined, not by what the petitioner could have obtained for the gold if it had been delivered or what the gold

would have been worth to the petitioner, but by what it would have cost the parties to deliver the gold in London or "at the nearest accessible point to Holyoke." The correct rule, whether for the determination of the equivalent or for its measurement as if it were damages, is that set forth by this Court on that score in the *Perry* case and in *Hicks* vs. *Guinness*. It is the value of gold *in Holyoke* which determines this question. It is what the gold delivered *there* would be worth to the *petitioner*. It is not what it would cost the *respondent* to deliver it *anywhere else*."

B. The $35 per Ounce.

The petitioner argues that the equivalent must be determined by the number of dollars into which the specified quantity of gold could hypothetically have been coined. Its contention is that the quantity of gold specified should be commuted into gold coin and that the equivalent equals one dollar in currency for every such dollar in gold coin.

This is inconsistent with the petitioner's argument against the application of the Joint Resolution. There it asserts that the mention of the gold coin in the indentures serves merely the function of describing, once for all, a quantity of gold bullion which might as well have been expressed in ounces or grains (petitioner's brief, p. 36). And bullion, it argues, does not come within the Resolution. But here, when it comes to determine the equivalent, it argues that the only significance of the bullion is the amount of gold coin that it could be coined into. The bullion, instead of being simply bullion, becomes potential gold coin. We are back to the gold coin which had described it.

Moreover, if this is the way to determine the equivalent, the petitioner must concede that the Joint Resolution applies. For then the rentals will call for a number of dollars in currency, which shall be equal to a number of gold

dollars, which in turn is to be measured and determined according to the weight and fineness prescribed by Congress for gold coin. That is surely an obligation which is payable in money. It requires payment in an amount in money measured, not by the value of gold, but by gold coin, the more definitely so because the measure of the money is the mint price of the gold coin instead of its market price. And it is obviously capable of being discharged dollar for dollar. Thus, our rental clauses, construed as the petitioner contends they should be construed for the determination of the equivalent, are obligations which are included in the Joint Resolution, on the petitioner's own construction of the Resolution as restricted to gold coin. Hence our rentals must be discharged upon payment in currency, dollar for dollar; and the basis must be a dollar of the particular gold coin specified.

So we turn to the position which the petitioner took in its petition and at the trial, that the equivalent meant the market or commodity value of the quantity of gold specified. Its claim for a price of $35 was based upon what it asserted was obtainable for gold from the Government (R. 5-7). There was no other market.

The question is whether the petitioner could legally have obtained $35 an ounce from the Treasury on July 1, 1934, October 1, 1934, and January 1, 1935, for gold paid it as rentals under these indentures on those dates by the respondent in Holyoke, which is when and where these rentals were payable. And inasmuch as the prohibitions and restrictions under which gold has been placed depend upon its use, this question is not: What price any gold? It is: What price this gold; that is, gold used in payment of these rentals, under these indentures? Gold to be used in the arts and industries, for jewelry, etc., or for gold newly mined and shipped directly to the mint, or for gold imported and trucked directly to the Treasury, is not such

gold as can be regarded as available for these payments, and its value is not available for the purpose of determining the equivalent of the gold which these indentures use as the measure of that equivalent. Yet that is the only gold which the Treasury would buy at $35 an ounce. Detailed proof of this is given in an appendix.

Therefore, we conclude: The price of $35 an ounce provided in section 42 of these Provisional Regulations is not a criterion of the equivalent of gold under our indentures, and does not furnish any relevant evidence as to the price of gold by which that equivalent may be determined. For no mint is authorized by these Regulations to offer $35 for any gold which has been, or which we can assume to have been, used for such a purpose as paying our rentals. As this Court said in the *Perry* case (294 U.S. at 357):

> "In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to *assume* that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange or *for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation.*" (Our italics.)

A District Court has recently ignored this. In *Emery Bird Thayer Drygoods Company et al.* vs. *Williams et als.*, 15 Fed. Supp. 938, a lease reserved a rental of 139,320 grains of pure gold on each quarter-day, provided, however, that the lessors might at their option require, in lieu of any such quarter-yearly delivery of pure unalloyed gold, the payment of $6000 in such lawful currency as the lessors might designate.*

* Since the option lay with the lessors, the rental was payable only in the gold, and not in money, unless they exercised their option, which they did not do.

The court held that the equivalent in value of the 139,320 grains of gold was $10,158.76 in currency, at the rate of $35 an ounce, as for newly mined gold, saying: "The *assumption* here must be that *lawfully* there has been delivered to the lessors and that *lawfully* they have the stipulated quantity of gold" (footnote to p. 945). (Italics ours.)

No, the impossibility which made any assumption necessary is not simply that it was impossible *in fact* to deliver the gold. It was a *legal* impossibility which prevented the delivery of the gold. Even if it had been possible *in fact* for the lessee to hold any gold that had been delivered, it would have been impossible *in law*. The assumption on which the equivalent is to be fixed must be the same as the circumstances which made it necessary. It is not logically proper to shift premises. It is not proper to say: Had the gold been delivered, it would have been *lawfully* worth so much, when the reason why it was not delivered was that it was *unlawful*. Yet the court made the lessee pay on the assumption that he could have lawfully delivered the gold, when we know he could not. It gave the lessor more than it knew he could lawfully have turned the gold in for. What the court was really assuming was that both the lessor and the lessee had violated the Regulations.

It was just such a false assumption that this Court warned against in the *Perry* case (294 U.S. 330, at 357), in the quotation we have just given above.

C. The Equivalent is $20.67 an Ounce.

The only relevant evidence, we submit, of the value of gold was the price obtainable from the Government at $20.67 an ounce, fixed by the Order of the Treasury of January 15, 1934 (Debtor's Exhibit A, which appears in the Record, at page 81). It fixes January 17th as the last

day for the surrender of gold coin, gold bullion, or gold certificates, and instructs the fiscal agents of the United States in respect to gold thereafter surrendered to "pay for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion $20.67 an ounce."

It is still in force, and was in force on the dates when the rentals here in issue became due. It was not affected or modified by the devaluation of the dollar under the Gold Reserve Act of 1934. The Secretary of the Treasury so stated expressly in telegrams to the Governors of Federal Reserve Banks on February 1, 1934, and again on February 7, 1934, which appear in the Record, on pages 83 and 84.

The result is, as Judge Brewster ruled:

> "Any gold bullion received on account of rentals falling due in July or October 1934, or January 1935, would be held by the petitioners in non-compliance with the orders, and the only opportunity open to it would be to surrender it and to receive $20.67 an ounce. In no market could it obtain a better price" (R. 110, at bottom of page).

It does not matter how much or how little gold has been or is being bought by the Treasury at this price. The amount is irrelevant. The point is that $35 would not have been available, and that only $20.67 would have been available.

It is true that the Secretary of the Treasury reserved the right to change this price at any time. So, likewise, he expressly reserves the right to change the price of $35 (see section 42 of the Regulations; R. 59).

It is also true that the Secretary of the Treasury reserves his rights to collect any penalty which may be due for non-compliance with the law. That is simply part of the cause for the impossibility of paying in gold. The payment in gold was impossible because it was forbidden, and forbidden

under a penalty. This does not change the fundamental and solely relevant fact that, if the gold had been paid, all the petitioner could have got for it, and hence all it could have been worth to the petitioner, was $20.67 an ounce.

Thus it will be seen that the Treasury Regulations and the Joint Resolution have the common purpose of depriving gold of all monetary use. All the gold in the country is to be surrendered to the Treasury, excepting only gold in the arts and industries, and such as might safely be neglected, *i.e.*, fabricated, scraps up to 5 ounces, nuggets, rare coins, etc. In order to effect this surrender the Treasury offers to buy all *new* gold, newly mined or newly imported, and so potentially able to enter the monetary life of the country, either up from the ground or in over the frontier, and will pay $35 an ounce for it. This price applies only to *new* gold, fresh from the mines and without having served any monetary use, and to gold fresh from importation and direct from the custom house, and to all *licensed* gold. All *other* gold will be paid for at the price of $20.67, for that is the sum which corresponds and is consistent with the treatment of the monetary use of gold in contracts and obligations by the Joint Resolution, whose dollar-for-dollar provision gives in effect to such gold the same price of $20.67. In other words, and in very brief: The price of $35 applies only to gold which neither has been nor is to be put to any monetary use, and the price of $20.67 and the dollar-for-dollar provision in the Resolution apply to all gold which has been or is to be put to monetary use.

Therefore, even if the Joint Resolution does not apply, the rentals payable under the new Treasury Regulations and the Gold Reserve Act of 1934 remain at the same amount as before, that is, $20.67 an ounce. To allow the petitioner more would be to make payment of the equivalent of gold more valuable to it than payment of gold. The equivalent would then belie its own name. Or, if we

choose to regard the equivalent as if it were damages, to allow more than this would be giving the petitioner more for a breach of the obligation than it would receive by its performance, which would be absurd. On the other hand, $20.67 an ounce is the only price which is consistent with the policy and purpose of all the recent gold legislation, including the Joint Resolution.

D. Perry vs. United States * is a Binding Precedent for the Determination of the Equivalent at $20.67 an Ounce.

Perry brought suit on $10,000 Fourth Liberty Loan 4¼% bonds, which had been called on April 15, 1934, and presented for payment on May 24, 1934. That is after devaluation. Both dates were subsequent to the enactment of the Gold Reserve Act of 1934, which was passed on January 30, 1934, and subsequent also to the President's Proclamation and to the Treasury Regulations of January 30, 31, 1934. So this Act, and the Proclamation, and the Regulations had as much effect on Perry's bonds as it did on our rentals.

Perry claimed that he should be paid $1.69+ in currency for every $1 of gold coin. He computed that by taking the weight of the gold dollar fixed by the President under the authority of the Gold Reserve Act of 15 5/21 grains as compared with the dollar's previous weight of 25.8 grains. This is the same as the $35 per ounce which the petitioner here claims, as compared with the $20.67 an ounce which it has been paid, and calculated in the same way.

The Joint Resolution was held invalid as applied to Perry's government bonds. If we now assume, as, in this part of our brief, we are assuming, that the Resolution does not apply to our indentures, then the petitioner here is in the same case as Perry was there, and the rule of equivalence which the Supreme Court laid down in the

* 294 U.S. 330.

Perry case is authoritative in this case. For there is no difference between his gold coin and our gold on the question of determining or calculating their equivalent in money.

What this Court said there applies here. It said (294 U.S. at 357-358):

> "Plaintiff demands the 'equivalent' in currency of the gold coin promised. But 'equivalent' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could be legally used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

> "Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable."

After that statement by this Court little need be said in reply to the petitioner's argument that the provision in section 15 of the Gold Reserve Act of 1934 (R. 72) (and the similar provision in section 4 of the Regulations (R. 41)), are such a definition of the word "equivalent" as will fix its meaning in our indentures. It was this Act upon which Perry relied in his suit. It is a definition for the purposes only of the Act, and expressly so stated. It cannot determine the meaning in these indentures.

The petitioner refers to its duty of maintaining the dam, and the burden of that duty. The fact that these indentures impose on it the duty of maintaining its dam and a constant supply of water and power puts this petitioner in no different position from Perry, or from any one else who has business engagements to perform. Nor do we know how much of the petitioner's income depends on these and similar indentures. So we may ignore the argumentative fears of its counsel for its continued solvency and existence (in its Petition for Certiorari, pp. 8-9). May we say that such fears might with at least equal point be raised by the respondent, whose rents under these indentures would at once be raised by 69 cents per dollar and who is already insolvent?

The petitioner has made no attempt to show that it has suffered any loss, but it argues that it will suffer loss because the price level, going up roughly in the proportion to which

the gold content of the dollar has been reduced, will have the effect of raising the cost of its materials, wages, salaries, and taxes.

But what this Court said in the *Norman* case (294 U.S. 240, at 315) about the debtor is equally true of the creditor, as the Circuit Court of Appeals below perceived.

This Court there said:

> "The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their 'gold bonds' must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. . . . It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency."

With these words evidently in mind, the Circuit Court of Appeals declared (R. 133):

> "The petitioner can pay its taxes, workmen, for materials and interest on its obligations and all other expenses in the same currency it receives, which is

legal tender for all public or private debts. It does not have to pay out currency based on a standard unit of value containing 25.8 grains of gold and receive currency based on a unit of value containing 15 5/21 grains of gold. It receives and pays out currency based on the same standard, viz.: a gold dollar containing 15 5/21 grains of gold, nine tenths fine. Except in so far as the prices of labor and materials may have been increased by the devaluation of the dollar, it suffers no hardship. The prices of labor and materials are always subject to fluctuation without any change in the standard unit of value of the currency."

The petitioner can suffer hardship only in so far as these new dollars buy less of what the petitioner needs in materials, wages, taxes, etc.—not in so far as they buy less gold. It is not a jeweler. Gold is not its raw material.

There is no showing, no offer to prove, that the cost to the petitioner of its labor and its materials has been or will be increased. Without such a showing we are left to the assumption that all prices, including the petitioner's, go up automatically with devaluation and solely by reason of that factor.

The closest approach to any basis for that assumption is a theory which has recently received more notoriety than general approval. It is untenable. It is not a theory which has been generally accepted by economists.

"Here we are concerned only with the peculiar Warren-Pearson variant of the managed currency doctrine which holds that prices are made by a simple comparison of the commodity values of goods and of gold; we conclude that their own evidence gives strong support to the contrary position" (Charles O. Hardy, "The Warren-Pearson Price Theory," 1935, Brookings Institution, p. 34).

> "Professor Warren, true enough, seems to have labored under the impression that prices would rise by a percentage equal to that by which the price of gold was raised, although he did not take the trouble to prove either that general prices or those of international commodities would rise to that extent. But that hardly justifies the large expenditures of effort made to prove what is perfectly clear, namely, that prices of commodities in general or of special groups of commodities do not necessarily fluctuate closely with fluctuations in the buying price of gold" (S. E. Harris, "Exchange Depreciation," 1936, Harvard University Press, p. 255).

Even if we should infer that the prices of the petitioner's labor and materials will go up, that is very far from showing that the petitioner ought to get the 69 cents it here claims. To justify that claim it must show that its costs will go up 69%. To the extent of anything short of that, even the petitioner must agree that the 69 cents would be "not a recoupment of loss in any proper sense, but an unjustified enrichment," an extra 69 cents which it might properly distribute as an extra dividend.

The respondent submits that the judgment under review should be affirmed.

Respectfully submitted,

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APPENDIX.

The Gold for which the Treasury would Pay $35 an Ounce.

This price of $35 an ounce was offered under the authority of section 8 of the Gold Reserve Act of 1934 (R. 61), which reads as follows:

> "With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts . . . at such rates and upon such terms and conditions as he may deem most advantageous to the public interest" (R. 67).

Article VI of these Regulations (R. 56) is the one which exercises this authority to purchase gold, and prescribes what gold will be purchased. Section 42 (in this Article VI) (R. 59) sets the price of $35 an ounce (less ¼ of 1%) for the gold which the mints may purchase, which is specified in section 35* under the following four heads:

(*a*) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use;

(*b*) Unmelted scrap gold;

(*c*) Gold imported into the United States after January 30, 1934; and—

(*d*) Such other gold as may be authorized from time to time by rulings of the Secretary of the Treasury.

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* The amendment to this section which appears in the Record, on pages 55-56, is dated August 26, 1935, and is therefore subsequent to any of the dates here involved, and subsequent also to the opinion and decree below. However, it simply excludes United States gold coin from the gold which the mints may purchase, and hence is restrictive and not expansive of the price of $35.

Before examining the extent of this authority, to see whether the gold which the mints are to purchase at $35 an ounce includes gold which might have been used to pay rentals under our indentures, we must note that this section 35 is strictly limited to these four items, for it goes on to say:

> "Provided, however, that no gold shall be purchased by any mint or assay office under the provisions of this Article which, in the opinion of the mint, has been held at any time in non-compliance with the Act of March 9, 1933, any Executive Orders or Orders of the Secretary of the Treasury issued thereunder, or in non-compliance with any Regulations prescribed under such orders or licenses issued pursuant thereto, or which, in the opinion of the mint, has been acquired and held, transported, melted, or treated, or held in custody in violation of the Act or of Regulations issued thereunder, including these Regulations."

It is the gold covered by this proviso to which the Order of January 15, 1934, containing the price of $20.67, still applies (see Debtor's Exhibit A, R. 81-84). Hence the offer of $35 applies only to the four items of gold specified in this section 35 above.

To examine each of the four items separately:

(*a*) *Newly Mined Gold:*

No gold which had been used to pay our rentals, either actually or constructively for the purpose of ascertaining its equivalent, is entitled to this price of $35, because after such use it would no longer have been newly mined.

(*b*) *Unmelted Scrap Gold:*

Scrap gold is defined by section 4 of the Regulations as—

> "gold sweepings and fabricated gold . . . which is no

longer held for the use for which it was processed or manufactured" (R. 41).

By section 39 (in Article VI)—

> "No deposit of unmelted scrap gold shall be accepted unless accompanied by a properly executed affidavit on form TG-22. In addition the depositors of such gold shall establish to the satisfaction of the mint that the gold was acquired, held, and transported by them in accordance with a license issued pursuant to these regulations" (R. 58).

This is the license required by Article III (R. 47) for the purpose of acquiring and holding gold which the mint is satisfied is required for legitimate and customary use in industry, profession, or art (section 23). Therefore such gold is not available for our use, and its price of $35 is not available to determine our equivalent.

(*c*) *Imported Gold:*

Section 40 (in Article VI) limits the purchases of imported gold under this item (*c*) to—

> "only such gold imported into the United States as has been in customs custody throughout the period in which it shall have been situated within the customs limits of the continental United States, and then only subject to the following provisions:
>
> "Upon formal entry into the United States of any gold intended for sale to a mint under this article, the importer shall declare to the collector of customs at the point of entry where the gold is formally entered that the gold is entered for such sale" (R. 59).

The petitioner could not avail itself of this section on any gold which, we are assuming, has been paid to it in

Holyoke. Therefore the $35 offered for imported gold under (*c*) cannot be used to fix the price in our case.

The only remaining provision for the purchase of gold at $35 an ounce is:

> (*d*) "such other gold as may be authorized from time to time by rulings of the Secretary of the Treasury."

The Secretary has exercised this authority by five General Rulings, which appear in the Record, at pages 75-80. None of them affects our situation. So the Secretary has authorized no such purchases of gold under (*d*) as would make the price relevant to our purposes.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 180

HOLYOKE WATER POWER COMPANY, PETITIONER

v.

AMERICAN WRITING PAPER COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The immediate issue in this case is whether the petitioner and other creditors holding similar obligations are entitled to a more favorable position with respect to their claims than the holders of gold clause obligations like those considered by this Court in *Norman v. Baltimore and Ohio Railroad Co.*, 294 U. S. 240.[1] The Government submits

[1] The following gold clause is typical of those contained in the indentures involved in this case (R. 18, 22):

"* * * yielding and *paying* to the said Holyoke Water Company and its successors and assigns forever, as rent for each of the first three 24 hour non-permanent mill-powers above granted a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the coinage of the year one thousand eight hundred and ninety-four, or the equivalent of this commodity in United States currency, for each and every year, *payable* in equal semiannual payments." [Italics supplied.]

that such a distinction among creditors having gold clause obligations would be in the teeth of the policy of Congress as embodied in the Joint Resolution of June 5, 1933 (*infra*, p. 23), and is in no way compelled by the Constitution. If the argument of petitioner were to be accepted, the power of Congress over the monetary system would be frustrated by essentially the same type of private arrangements which this Court in the *Norman* case held had been brought within the control of Congress by the Joint Resolution. If the argument of petitioner is sound, the result would be that a slight variant in the form of gold clauses would serve to nullify the effort of Congress, sustained in the *Norman* case, to assure for the country a single and uniform system of money. In support of the view that such a result, which must be regarded with apprehension, was validly forestalled by Congress, the United States submits the following considerations as *amicus curiae*.

I.

THE JOINT RESOLUTION SHOULD BE CONSTRUED TO APPLY TO THE GOLD CLAUSES INVOLVED IN THIS CASE

The Resolution must be construed in the light of its purpose and the situation to which it was directed. The history of the Acts, orders, and regulations relating to gold and foreign exchange was considered and described by this Court in the Gold Clause Cases. As recognized in the *Norman*

case, *supra*, the broad Congressional policies underlying that legislation were:

> 1. The determination of the value of the standard unit of currency, both in its domestic aspects and in relation to foreign currencies;
>
> 2. The establishment of a uniform currency, with parity among the various kinds of currency, and the making of that currency dollar for dollar legal tender for the payment of debts; and
>
> 3. The conservation of the gold resources of the Government, the insurance of its command of gold in order to protect and to increase its reserves, and the prohibition of the exportation of gold or its use for any purpose inconsistent with the needs of the Government.

In effectuating these policies, the Congress deemed it necessary to, and did, regulate gold bullion as well as gold coin. It will be recalled that all of the gold Acts, orders and regulations dealt with both gold bullion and gold coin (294 U. S. at 295–297). This purpose of the Congress to control the use of gold whether in the form of bullion or coin is made entirely clear by the preamble to the Resolution, which reads as follows:

> Whereas the *holding of or dealing in gold* affect the public interest, and are therefore subject to proper regulation and restriction; and
>
> Whereas the existing emergency has disclosed that provisions of obligations which

> purport to give the obligee a right to require *payment in gold* or a particular kind of coin or currency of the United States, *or in an amount in money of the United States measured thereby,* obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. [Italics supplied.]

It is evident that the Congress could not have effectuated its policies unless it intended by the Resolution to strike down gold bullion clauses as well as gold coin clauses, designed to provide for payment where the gold was used as the mode of payment or the measure of the amount of payment in money of the United States. Gold clauses like the present constituted the same obstruction to the exercise of the monetary powers as the gold clause involved in the *Norman* case. The typical gold clause in this case called for payment of a quantity of gold equal in amount to 1500 United States gold coin dollars, or the equivalent in United States currency. Whether such a promise is to be taken literally as calling for payment in gold or is to be treated as a gold value clause, it is directly opposed to the monetary program of the Congress which the Resolution was designed to safeguard.

Prior to the enactment of the Resolution, Congress had provided by Section 43 of the Act of May

12, 1933 (c. 25, 48 Stat. 51) that the President should have authority to reduce the weight of the gold dollar and that the weight as so fixed should be the standard unit of value with which all forms of money should be maintained at a parity. Beginning in April, 1933, gold coin and gold bullion were in the process of being requisitioned by the Government, and the value of the dollar in the foreign exchange markets was declining. Accordingly, although at the time of the passage of the Resolution the dollar had not yet been devalued, "devaluation was in prospect and a uniform currency was intended." *Norman* v. *Baltimore & Ohio Railroad Co., supra,* at p. 314. The disparity of conditions and the dislocation of the national economy which would have resulted if gold clause obligations had not been stricken down were described by this Court in the *Norman* case.

The same disparity and dislocation would be produced by the type of gold clause involved in the present case as by the type involved in the *Norman* case. The petitioner here, like the creditor in the *Norman* case, contends that, while the income of the debtor is necessarily determined by the new standard, the indebtedness of the debtor on its gold clause obligations "must be met by an amount of currency determined by the former gold standard" (294 U. S. at 315). Because the standard unit of value in this country is defined in terms of grains of gold, the potential dislocation of the domestic economy described in the *Norman* case would exist as fully

where the obligation to pay dollars is measured by gold as where it is measured by gold coin.

The petitioner admits that the purpose of this contract was "akin" to the purpose of the contracts before this Court in the *Norman* case (Pet. brief, p. 18). In the *Norman* case the Court said (p. 302): "We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money." It is clear that the gold clause in the present case was used not because the obligee desired to contract with respect to something other than United States currency, but because the obligee hoped to escape the consequences of the future exercise by the Congress of its monetary powers. To attribute different consequences to the gold clause used in this case than were attributed to the gold clauses considered in the *Norman* case, though the purposes of all such gold clauses were admittedly the same, would be to invest the use of one or two additional words with a kind of magic potency sufficient to nullify the ends validly sought to be accomplished by the Congress in the Joint Resolution.

Necessarily, the Congress intended to cover both types of gold clauses in order to provide a uniform and equitable settlement of all money obligations. Otherwise there must be imputed to Congress an intention to permit inequities to result from the revaluation of the dollar, and to sanction thereafter the use of a gold clause which would nullify

the purposes sought to be attained by the Resolution. Had Congress permitted the continued use of such gold clauses, the result would have been an obstruction to the exercise by Congress not only of its power to decrease the gold content of the dollar, but also of its power to increase the gold content of the dollar, since to enforce gold clauses in the latter situation would reduce the value of gold clause obligations to the creditor in relation to simple dollar obligations, and so would create, *pro tanto*, a dual monetary economy.

The intention of Congress appears clearly both from the preamble of the Resolution, which has been quoted, and from the operative provisions. The Resolution strikes down as against public policy clauses which "require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby."[2] The language is comprehensive. Con-

[2] The Congress in Sections 2 and 3 of the Act of March 9, 1933 (48 Stat. 1), used the terms "gold * * * coin or bullion", and "gold coin, gold bullion", when it intended to reach limited classes of gold, and used the term "gold" in referring both to coin and bullion. *Cf.* also U. S. C., Title 31, secs. 311, 327, 428, 429, and 430. The Congress also used the generic term "gold" in Section 3 of the Gold Reserve Act of 1934 (R. 65–66) when it wished to describe gold in all of its forms and conditions, including gold bullion as well as gold coin. See also Sections 6–10, 14 (c), and 15 of the Gold Reserve Act of 1934 (R. 66–69, 72). (48 Stat. 340–344). Such use by Congress of the terms "gold", "gold coin", and "gold bullion" in related monetary legislation makes it clear that the term "gold" as used in the Resolution was to be all-inclusive and not limited in its meaning to gold coin.

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gress used the world "gold" in the Resolution as an inclusive term which would reach any contracts calling for payment where gold in any form was used as the mode of payment or the measure of the amount of payment in money of the United States.

The Resolution, in dealing with gold clauses, was limited to the striking down of gold payment clauses, doubtless because it was felt by Congress that *bona fide* contracts calling for the sale or delivery of gold for industrial purposes (such as to a manufacturer of jewelry by a person engaged in the business of supplying gold for such purposes) did not then constitute an interference with, or an obstruction to, the exercise of the Congressional monetary powers. But by eliminating from the scope of the Resolution the non-monetary type of gold bullion contract, Congress did not also intend to, and did not, eliminate from the scope of the Resolution gold *payment* clauses where gold is used as the mode of payment or measure of the amount of payment in money of the United States.

The Resolution should be construed liberally to effectuate its spirit and purpose. This would be true even though the letter of the Act did not clearly cover the case at hand. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 464–465, and cases cited; *United States* v. *Wiley*, 11 Wall. 508; *Stewart* v. *Kahn*, 11 Wall. 493; *Smythe* v. *Fiske*, 23 Wall. 374; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Gooch* v. *Oregon Short Line*, 258 U. S. 22, citing

Johnson v. *United States*, 163 Fed. 30; *Barrett* v. *Van Pelt*, 268 U. S. 85; *Fleischmann Construction Company et al.* v. *United States to the use of Forsberg et al.*, 270 U. S. 349; *Danovitz, Surviving Partner of Feitler Bottle Company* v. *United States*, 281 U. S. 389; *Spencer* v. *Myers*, 150 N. Y. 269, 273–275.

The language of the Resolution is comprehensive. With respect to gold clauses, it reveals an intention "to stop the whole business" as did the Eighteenth Amendment with respect to the traffic in liquor. Cf. *Grogan* v. *Walker & Sons*, 259 U. S. 80, 89; *Danovitz* v. *United States*, 281 U. S. 389, 397. Like the provisions of the Revenue Acts with respect to the taxation of gross income, the Resolution discloses an intention by Congress "to use its power to the full extent." *Douglas* v. *Willcuts*, 296 U. S. 1, 9, and cases cited.

But there is no need here to invoke this principle of construction, for the present obligations fall squarely within the letter of the Resolution. They are obligations payable, on their face, in gold or at the option of the debtor (R. 97) in an "equivalent" amount of currency, that is, an amount in money of the United States measured by gold, within the precise terms of the Resolution. The argument of petitioner that "gold" as used in the Resolution means "United States gold coin" would make the use of the term "gold" superfluous, since obviously gold coin is included within the subse-

quent phrase "a particular kind of coin or currency."[3]

Petitioner stresses the definition of obligation in the Resolution as limited to obligations "payable in money of the United States." But the present indenture is clearly such an obligation. The indenture must be read as a whole to determine whether in fact it is an obligation payable in money or is one to deliver a commodity. The answer, it seems to us, is plain. The obligation was payable at all times in money, particularly since the obligor admittedly had the option to pay in currency and the stipulated gold was used as a measure of value. At the due dates of payment, as the court below pointed out, payment in currency was the only possible method of performance. But even if the alternative to pay "a quantity of gold which shall be equal in amount to fifteen hundred ($1,500) dollars of the gold coin of the United States of the standard of weight and fineness of the coinage of the year 1894" be viewed in isolation, it is an obligation payable in money of the United States, not only because gold is used as the measure of value but because the obligation was capable of

[3] The report of the House Committee on Banking and Currency, dealing with the Resolution (H. Rep. 169, 73d Cong., 1st Sess., p. 1), states: "The resolution * * * provides that obligations, public and private, expressed to be *payable in gold or in a specific coin or currency*, may be discharged dollar for dollar in legal tender." [Italics supplied.] To the same effect, see 77 Cong. Rec., pp. 4528–4532 (remarks of Chairman Steagall).

being discharged by payment of the stipulated gold coin of the old standard. Indeed, such payment would have been the most meticulous performance of that alternative. That the parties were dealing in terms of a money obligation is apparent also from the provision in the indentures that the obligor shall *pay* (not deliver) the stipulated rental (see note 1, p. 1, *supra*).[4] But *cf.* Pet. brief, p. 13.

The use of the appellation "this commodity" can not alter the nature of the obligation as disclosed by its operative provisions. In this regard private parties stand on no better footing than legislatures, which can not, for example, by mere designation change the essential character of an exaction. Cf. *Lipke* v. *Lederer,* 259 U. S. 557, 561–562.

Even if petitioner were correct in narrowly construing the word "gold" in the Resolution to mean "United States gold coin", the present obligations would be covered. As already stated, the alternative of payment in "a quantity of gold", etc., was performable by payment in gold coin; but in any event that alternative became impossible and the contract is one for payment in currency. The debtor has in fact exercised its option so to pay.

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[4] Even at the time of the institution of this suit the petitioner was thinking in terms of *payment.* Throughout its petition herein in the District Court the word "payment" is used in connection with the rentals prescribed under the indentures (R. 4–8).

And the "equivalent" in currency designated in the indentures is measured by gold coin, for the amount of gold by which it is measured is in turn measured by "1500 dollars of United States gold coin" of the then standard of weight and fineness. Thus, even on petitioner's narrow construction of the Resolution, which we submit is unwarranted, the obligation, payable in an amount of money measured by gold coin, comes squarely within the Resolution.

Petitioner stresses also the provision in the Resolution providing for discharge of obligations "dollar for dollar." Petitioner suggests that the "dollar for dollar" provision should be applied to the obligation to pay in currency only after the "equivalent" has been determined in accordance with petitioner's view. Such an application of the "dollar for dollar" provision in the Resolution would, of course, be wholly subversive of its purpose. By successive orders pursuant to the Act of March 9, 1933 (48 Stat. 1), persons generally were required to surrender gold at $20.67 an ounce (R. 83), in accordance with Section 3 of that Act providing for payment in "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States"; and persons were precluded generally from acquiring gold. See also Gold Reserve Act of 1934, Section 13 (R. 71). The Joint Resolution sought to deal similarly with claims to gold, and claims measured by gold, payable in the future. The Resolution sought to

assure that persons indebted on gold clause obligations would not be required, as a result of the requisitioning of gold and the decrease in the gold content of the dollar theretofore authorized, to pay more in dollars than they would have been required to pay in the absence of such requisitioning and revaluation. The "dollar for dollar" provision is a short expression declaring the intent of Congress that payment should be unaffected by clauses purporting to vary the dollar amount of the obligation according to changes in the value of gold. There is no practical difficulty in applying the "dollar for dollar" provision in the present case, as the brief of the respondent clearly demonstrates (pp. 21 to 22). It is no more difficult to determine the "dollar for dollar" amount of the obligation than it is to determine the increased amount of the obligation based upon petitioner's own contention.

More extended discussion of the application of the Resolution to the present obligations is not deemed necessary in view of the full treatment of the point contained in the brief of respondent (pp. 9–22).

In its larger aspect, wherever there is an attempt by parties to a contract to provide for payment in such a way that there is a translation or parallel set up between gold in any form on the one hand and coin or currency of the United States on the other, there is, *pro tanto,* an attempt to obstruct by private contract the undoubted power of the Congress to provide by legislation the relation between

gold and coin or currency of the United States. Wherever that situation exists Congress sought to strike it down by the Resolution. Wherever that situation exists the courts, it is submitted, will be zealous to sustain the undivided control placed by the Constitution in, and now effectively exercised by, the Congress.

II

THE JOINT RESOLUTION CONSTRUED TO STRIKE DOWN THE GOLD CLAUSES IN THIS CASE IS CONSTITUTIONAL

This Court has in a long line of cases recognized that "the Congress has complete authority to regulate the currency system of the country". *Nortz* v. *United States*, 294 U. S. 317, 328. See *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Knox* v. *Lee*, 12 Wall. 457; *Juilliard* v. *Greenman*, 110 U. S. 421; *Ling Su Fan* v. *United States*, 218 U. S. 302; *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240; *Perry* v. *United States*, 294 U. S. 330. This includes the power (1) to regulate the value of the standard unit of currency by providing for its valuation in terms of gold; (2) to establish a uniform currency, with parity among the various kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts; and (3) to conserve the gold reserves of the Government, to insure its command of gold in order to protect and increase these reserves, and to prohibit the exportation of gold or its use for any purpose

inconsistent with the needs of the Government. *Norman* v. *Baltimore & Ohio R. R. Co., supra.*

As heretofore stated, the Congress deemed it essential for the proper exercise of its monetary powers to regulate gold bullion as well as gold coin; and the laws, orders, and regulations relating to gold did, in effect, regulate gold bullion as fully as they regulated gold coin. That the powers of the Congress extend to regulation of the use of gold bullion as well as of gold coin may not be successfully challenged. In *Nortz* v. *United States*, 294 U. S. 317, 329, this Court said:

> Plaintiff explicitly states his concurrence in the Government's contention that the Congress has complete authority to regulate the currency system of the country. He does not deny that, in exercising that authority, the Congress had power "to appropriate unto the Government outstanding gold bullion, gold coin and gold certificates." Nor does he deny that the Congress had authority "to compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession." These powers could not be successfully challenged. *Knox* v. *Lee*, 12 Wall. 457; *Juilliard* v. *Greenman*, 110 U. S. 421; *Ling Su Fan* v. *United States*, 218 U. S. 302; *Norman* v. *Baltimore & Ohio R. Co.*, decided this day, *ante*, p. 240.

As gold is subject to the power of Congress equally with gold coin, so contracts for payment in

gold or in an amount of money measured thereby are subject to a "congenital infirmity" (*Norman v. Baltimore & Ohio R. R. Co., supra*, at p. 308) equally with contracts for payment in gold coin or in an amount of money measured thereby. This is true particularly because of the fundamental relation which gold bears to the value of the dollar as fixed by Congress. For many years gold bullion was convertible at the mints into gold coin, and gold coin was exchangeable for bullion. 31 U. S. C., Sections 326, 327, 333. Gold bullion was exchangeable also for gold certificates, which were a part of the national currency. *Nortz v. United States*, 294 U. S. 317, 326. The standard unit of value has been fixed and is still fixed in terms of a stated number of grains of gold of a designated weight and fineness. That standard, or relation between gold and dollars, is meant to be uniform; and the continuing power of Congress to fix that standard or relation is not to be thwarted by private agreements purporting to establish a separate, and particularly a countervailing, relation. This, it seems plain, is the basis of the decision in the *Norman* case. The reasoning is applicable in at least as fundamental a sense where gold, instead of gold coin, is sought to be used by the parties in fixing the mode or measure of payment.

If gold clauses such as the one in this case are treated as "gold value" clauses, that is, as intended to set up a measure of the amount of payment if

gold is not paid or is not available, the language used by this Court in the *Norman* case at pages 314 to 316 is fully applicable as showing that such clauses are "hostile to the policy of the Congress and hence subject to prohibition". The measure of value set up by the present clauses is precisely the same as if the reference in the indentures had been solely to gold coin. Contracts payable in gold or in an amount in money of the United States measured thereby interfere not only with the Congressional power to reduce the gold content of the unit of value, but also with the Congressional power to increase the gold content of the unit of value, in which case the creditor rather than the debtor would claim that he is injured. See p. 7, *supra*.

If, on the other hand, gold clauses like the present "were to be taken literally, as calling for the actual payment" in gold, "they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of" gold. *Norman* v. *Baltimore & Ohio R. R. Co., supra,* at page 313.

Since such gold clauses interfere with the exercise by the Congress of its constitutional authority the Congress has the power to invalidate them. *Norman* v. *Baltimore & Ohio R. R. Co., supra.* The Chief Justice, in the *Norman* case, said (pp. 307–308):

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but

> when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

And again (at pp. 309-310):

> There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt.

The action of the Congress in striking down these gold clauses is not arbitrary or capricious, but has a reasonable relation to a legitimate end. The number of gold clauses similar to those in this case, and the dollar amounts involved in such clauses, is not a matter of common knowledge which may be judicially noticed. No evidence was introduced on this point by the petitioner, who had the burden of establishing, if it be the fact, that the number of such contracts is small. But even if it were true that there are outstanding only a small number of contracts containing gold clauses of the type involved herein, nevertheless such gold clauses are obstructions to the policy of Congress and must be stricken down if Congress is to exercise its power over gold clauses generally, and if it is to deal uniformly and equally with all gold clause money contracts having as their basis the same fundamental purpose, namely, to attempt to

nullify, in individual cases, an increase or reduction of the gold content of the unit of value.

In *Philadelphia, Baltimore and Washington Railroad Company* v. *Schubert*, 224 U. S. 603, the basis of Congressional power in these circumstances was thus stated by the Court (pp. 613, 614):

> Nor can the further contention be sustained that, if so construed [as applying to existing contracts], the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority *to the continuing operation of previous contracts*, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish *uniform* rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority. [Italics supplied.]

See also *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467.

To distinguish between various types of gold clauses having the same fundamental purpose and effect would result in unwarranted inequities, increasing the burdens on some and giving an unjust enrichment to others. Furthermore, to conclude that the Congress is without power over gold clauses of the type here involved would be to nullify the powers of the Congress over the currency, recognized by this Court in the Gold Clause cases.

Mr. Justice Bradley in his concurring opinion in the *Legal Tender Cases*, 12 Wall. 457, stated, at page 567:

> I do not understand the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. *Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.* [Italics supplied.]

Similarly, if the Congress lacks power to regulate gold clause contracts employing gold generically, instead of gold coin, as the mode of payment or measure of the amount of payment in money of the United States, the powers admittedly vested in the Congress would be nullified by the substitution of a few words to make all contracts payable in an amount of money measured by gold. That the Congress has the power to strike down and prohibit the

future use of gold coin clauses cannot be challenged in view of the *Norman* case. Having that power, the Congress also has the power to prohibit devices in evasion of it, *Second Employers' Liability Cases*, 223 U. S. 1, 52, and to control cognate matters in order to make its regulation effective. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Westfall* v. *United States*, 274 U. S. 256, 259. But there is no need to rely on that basis of power. For, as has been shown, power over gold and gold payment clauses is as primary a power as that over gold coin and gold coin clauses.

It is a matter of common knowledge that in recent years in important commercial countries on the gold standard, redemption of currency in gold coin ceased;[5] in lieu thereof gold bullion is used to redeem currency in order to maintain parity and to regulate the value of the currency in the international field (see, for example, Sections 3, 5 and 6 (R. 65–67) of the Gold Reserve Act of 1934, c. 6, 48 Stat. 343, and Art. IV of the provisional regulations thereunder (R. 50)). This is commonly referred to as the "gold bullion standard." To

[5] The gold bullion standard was adopted in England by the Gold Standard Act, 1925; in France, by its monetary law of June 25, 1928. These laws appear in the Federal Reserve Bulletin, June 1925, p. 375, and August 1928, p. 570, respectively. The Bank of the Netherlands suspended the regular delivery of gold coins for domestic use on March 31, 1931. See *Annual Report of the Bank of the Netherlands* for the year ending on that date; and *Federal Reserve Bulletin*, August 1927, p. 596.

hold that the Congress is without power to deal with gold clause contracts employing gold as a mode of payment or measure of value would have the effect of preventing the Congress from dealing with the currency commensurately with the other great countries of the world and would deprive the United States of monetary powers which unquestionably are vested in every other nation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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DECEMBER 1936.

APPENDIX

PUBLIC RESOLUTIONS, No. 10, 73D CONGRESS, 1ST SESSION, APPROVED JUNE 5, 1933 (C. 48, 48 STAT., 112)

JOINT RESOLUTION To assure uniform value to the coins and currencies of the United States

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United

States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

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SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1936.

Holyoke Water Power Company, Petitioner, *vs.* American Writing Paper Company, Inc., Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 1, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy is one as to the number of dollars in present currency that will discharge a covenant for rent in leases antedating the reduction of the gold content of the dollar, the covenant being phrased in the manner hereinafter stated.

At various times between 1881 and 1897 thirteen leases were executed by the Holyoke Water Company, the petitioner, to the American Writing Paper Company, Inc., the respondent, for the enjoyment in perpetuity of water-power rights and privileges in consideration of an annual rental. With variations immaterial for present purposes, the provision for rental is the same in all the leases. By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency". In 1894 and continuously thereafter till January 31, 1934, the statutory gold content of the dollar was twenty five and eight tenths grains of gold, nine tenths fine. Since January 31, 1934, by force of the Gold Reserve Act of that year (48 Stat. 337) and the order of the President thereunder, the gold content of the dollar has been fixed to consist of fifteen and five twenty-firsts grains of gold, nine tenths fine. Before that reduction a Joint Resolution of the Congress, dated June 5, 1933 (48 Stat. 112), had declared that every obligation payable in

money of the United States, whether theretofore or thereafter incurred, should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts, irrespective of any provision contained therein whereby the obligee was given a right to require payment in gold or in a particular kind of coin or currency, or in an amount in money of the United States measured thereby. The precise terms of the Resolution and its recitals will be considered more at length hereafter.

In June, 1934, the dollar having been then devalued, the lessee corporation became insolvent or unable to pay its debts as they matured. Taking advantage of section 77B of the Bankruptcy Act, it filed a petition for reorganization which the Court of Bankruptcy approved. The lessor (petitioner here) intervened in that proceeding and prayed that the amount due to it for rent under the several water-power leases be inquired into and determined. On behalf of the lessee the contention was that by force of the Joint Resolution the debt was dischargeable, dollar for dollar, in the then prevailing currency. On behalf of the lessor the contention was that the market price of fine gold at the time of the default and later was $35 an ounce, or $31.50 for an ounce nine tenths fine, and that payment should be made upon that basis for as many ounces of such gold as were contained in the stipulated dollars at the execution of the leases. In pressing that contention, the lessor did not deny that the law declines to give effect to contracts whereby debts are made payable in gold coin, or in currency varying in amount with the gold basis of the dollar. *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240. What was argued was rather this, that the covenant here in question was not for the payment of a debt, but for the sale of a commodity, or if viewed as a covenant for payment, that the standard was the commodity value of the bullion, not the value of the coin as money, the difference being thought to be sufficient to change the applicable rule. The District Court held in favor of the lessee, and computed the indebtedness accordingly. 11 F. Supp. 518; see 9 F. Supp. 451. The Court of Appeals for the First Circuit affirmed. 83 F. (2d) 398. Because of the importance of the question we granted certiorari.

1. The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity.

The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other. They will be considered in succession.

By the first term of the alternative, there may be payment of the rent in the form of "a quantity of gold which shall be equal in amount to $1500 of the gold coin of the United States of the standard of weight and fineness of the year 1894". In this form there is no call for a stated number of ounces of fine gold, as if a goldsmith were providing for the uses of his business. The call is for gold that shall be as heavy and as fine as a stated number of gold dollars, with the result that delivery in such dollars is a payment in strict accordance with the letter of the contract. We must consider the situation of the parties, their business needs and expectations, in gauging their intention. When these are kept in view, the gold is seen to be a standard with which to stabilize the value of the dollar; the dollar not a yardstick with which to measure the quantity of the gold. To read the leases otherwise is to permit the realities of the transaction, its substance and essential purpose, to be obscured by forms and phrases. Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: "If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is *bona fide* for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed [assuming, of course, that contracts for the delivery of bullion are not prohibited by law]. But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case." Per Bradley, J., in *The Legal Tender Cases,* 12 Wall. 457, 566. Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman* v. *Baltimore & Ohio R. R. Co., supra,* p. 302; cf. *Feist* v. *Société Intercommunale Belge D'Electricité,* [1934] A. C. 161, 172, 173. The fact is of little moment that currency is characterized as a commodity in the verbiage of the covenant as long as it is currency. Cf. *Lipke* v. *Lederer,* 259 U. S. 557, 561, 562. Weasel words will

not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction. So read, the end to be achieved is shown forth unmistakably as a payment, not a sale.

This conclusion would be necessary though the first of the alternative forms of payment stood alone in the indentures. The necessity becomes even plainer when the first is considered in conjunction with the second. The lessee at its option may pay the equivalent of the gold "in United States currency". The presence of this alternative gives a quietus to the argument that the lessor was desirous of the gold as a commodity and was bargaining therefor. If there had been any such desire, the choice as to the forms of payment would never have been left to the lessee, as by implication of law it was, for a debtor, if methods of performance are alternative, may choose whichever one he pleases. 3 *Williston, Contracts*, § 1407; *Restatement, Contracts*, vol. 1, p. 493. In point of fact, there were statutes in existence at the time of the default in payment that made delivery of gold impossible. *Norman* v. *Baltimore & Ohio R. R. Co.*, supra, pp. 295, 296; *Nortz* v. *United States*, 294 U. S. 317, 327, 328; *Perry* v. *United States*, 294 U. S. 330, 355. The lessee would perforce have had to avail itself of the second term of the alternative, if it had been able to pay at all. But if both modes of payment had been preserved, the second equally with the first would have been effective to discharge the obligation. Payment in currency, quite as much as payment in coin or in bullion, was not only performance under the law, but performance under the contract, provided only that the value of the currency was equal, when paid, to the value of the gold. Whether that proviso has been abrogated is next to be considered.

2. A contract for the payment of gold as the equivalent of money, and *a fortiori* a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit.

The Resolution, for convenience of reference, is printed in the margin.* Its history has been traced in *Norman* v. *Baltimore &*

*"JOINT RESOLUTION.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold

Ohio R. R. Co., supra. There is no need to repeat what has been already done so thoroughly. The Resolution touches gold as well as coin or currency whenever transactions in either are within the evil to be remedied. We learn from the preamble that "provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts". Accordingly, all such provisions are declared to be against public

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or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'Obligation' means an obligation (including every obligation of and to the United States excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes', approved May 12, 1933, is amended to read as follows:

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"Approved, June 5, 1933, 4:40 p. m."

policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute. Cf. Executive Order of April 5, 1933, and August 28, 1933; Orders of the Secretary of the Treasury, December 28, 1933 and January 15, 1934; Emergency Banking Act of March 9, 1933, 48 Stat. 1, 2, sec. 3. An obligation to make delivery upon a *bona fide* sale is not fairly to be classified as an obligation "payable in money" (Joint Resolution, subdivision (b)), or so we now assume. But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit.

3. The argument is made that in the case now before us the currency called for by the contract is stated too indefinitely to be translated, dollar for dollar, as required by the Resolution, into the legal tender of the hour. But the difficulty is quite imaginary. Things that are equal to the same thing are equal to each other. There is application for the maxim here. If the currency to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then the covenant to pay the currency is tantamount to a covenant to pay the dollars, and dollars of the stated standard. This is the obligation that respondent took upon itself when it became a party to these leases. It is, however, the very obligation that has been outlawed by the statute as a menace to the maintenance of our monetary system. *Norman v. Baltimore & Ohio R. R. Co., supra,* p. 306, 311. "Dollar for dollar", the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law.

4. The argument is made that covenants of this particular form are so rare and exceptional that the protection of the monetary

system does not require their suppression, and that arbitrary suppression is inconsistent with the Fifth Amendment. How exceptional or rare they are, we have no means of ascertaining. For anything proved in the record or subject to judicial notice they may be illustrations, even if verbal variants, of a type common in the petitioner's business and indeed in many others. But the power of the Congress is not dependent upon the results of such a census. A particular covenant, if viewed in isolation, may have a slight, perhaps a trivial, influence upon the effectiveness and symmetry of a new monetary policy. The aggregate of many covenants, each contributing its mite, may bring the system to destruction. Rivulets in combination make up a stream of tendency that may attain engulfing power. No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass. Cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201. One cannot even say with reason that the effects of this particular covenant are to be classified as negligible. The lessee as the recipient of principal or income must accept payment from its debtors in the depreciated currency. It is injured, at least appreciably, if it is required to pay its creditors in dollars of a different standard. *Norman* v. *Baltimore & Ohio R. R. Co., supra*, p. 315. Receipts and disbursements are no longer on a common basis.

5. In last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, *is* the effect, and the covenant of the parties is to that extent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity." *Norman* v. *Baltimore & Ohio R. R. Co., supra*, pp. 307, 308. To that congenital infirmity this covenant succumbs.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER dissent.